Supreme Court, U.S.
FILED
961403 MAR 4 1997
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL RAILROAD PASSENGER CORPORATION, a foreign corporation, and CHICAGO UNION STATION COMPANY, a domestic corporation,

Petitioners,

vs.

NANCY E. VAN HOLT and LOUIS VAN HOLT,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. May a railroad that purchases a long-term disability policy for its employees, intending to use the benefits to satisfy its liability for lost wages under the Federal Employers' Liability Act, set off from an employee's lost wages award the benefits the employee has and will receive under the disability policy, or is the set-off limited to the amount of the premium paid by the railroad?

II. When a plaintiff pursues joint and several judgments against one defendant under the common law and another defendant under the Federal Employers' Liability Act, does the Supremacy Clause require that federal law controls the measure and amount of damages as to both defendants?

LIST OF PARTIES

National Railroad Passenger Corporation

—No parent company.

—No nonwholly owned subsidiaries.

Chicago Union Station

—Parent company: National Railroad Passenger Corporation.

—No nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, National Railroad Passenger Corporation ("Amtrak") and Chicago Union Station ("CUS"), respectfully petition this Court for a writ of certiorari to the Appellate Court of Illinois. Petitioners seek reversal of that portion of the decision of the Appellate Court of Illinois affirming the judgment of the Circuit Court of Cook County, Illinois against CUS, and that portion of the decision of the Appellate Court of Illinois limiting Amtrak's set-off rights on retrial to the premiums paid for the long-term disability policy Amtrak purchased to reduce its FELA liability for employee wage loss claims.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois affirming in part and reversing in part the judgment of the Circuit Court of Cook County, Illinois, is set forth in the Appendix, at App. 1, and is reported as *Van Holt v. National Railroad Passenger Corp., et al.*, 283 Ill. App. 3d 62, 669 N.E.2d 1288 (1996).

The Illinois Supreme Court's order denying the petition for leave to appeal, set forth in the Appendix, at App. 25, appears at 169 Ill.2d 590 (1996) (table).

An earlier opinion of the Appellate Court of Illinois, dated July 30, 1996, which was modified and superseded by the reported opinion, is set forth in the Appendix, at App. 31.

JURISDICTION

The Illinois Supreme Court denied defendants' petition for leave to appeal on December 4, 1996. (App. 25.)

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

U.S. Const. art. VI, cl. 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATUTES INVOLVED IN THIS CASE

45 U.S.C. § 51 (1988) provides:

> **§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined**
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the

death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 55 (1988) provides:

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

STATEMENT OF THE CASE

Plaintiff Seeks And Obtains Joint And Several Judgments Against Amtrak And CUS Under The FELA Measure Of Damages.

Plaintiff Nancy Van Holt, a payroll supervisor for defendant National Railroad Passenger Corporation ("Amtrak"), filed a complaint in the Circuit Court of Cook County, Illinois against Amtrak under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (1988) ("FELA"), and against Chicago Union Station ("CUS") under the common law, seeking to recover for injuries sustained when she slipped and fell in a taxi tunnel at Chicago Union Station.

Throughout the trial, plaintiff sought to impose joint and several liability on both Amtrak and CUS. To that end, she—

- submitted and the trial court gave a jury instruction setting forth the same elements and measure of damages as to both defendants (R. V5, C1164);
- submitted and the trial court used a jury verdict form obligating the jury to return the same damages verdict against both defendants (R. V5, C1196-97);
- acceded to an FELA jury instruction based on *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755 (1980) (jury must be informed that any damage award would not be subject to income taxes), as to both defendants, though such an instruction is contrary to Illinois common law (*see Klawonn v. Mitchell*, 105 Ill.2d 450, 457-58, 475 N.E.2d 857, 860-61 (1985)) (R. V13, 18-23, 44); and

- argued to the jury that the two defendants were essentially one entity, and that CUS was just a "shell" of Amtrak. (R. V13, 139.)

The jury returned a verdict in favor of plaintiff and against Amtrak and CUS in the amount of $3,050,000, which included $1,246,000 for future lost earnings and $875,000 for "loss of a normal life." (App. 5, 14, 16.) The jury further found that plaintiff was negligent and 10% at fault for the accident. Accordingly, the court entered a joint and several judgment against both defendants in the amount of $2,745,000.[1] (App. 5.)

Trial Court Excludes Evidence Of The Effect Of Taxation On Plaintiff's Net Earnings.

At trial, defendants had attempted to introduce evidence of the withholding taxes on plaintiff's net earnings over the years, to show that her net earnings recoverable under the FELA were much lower than her gross wages. (R. V13, 19-23, 43-47.) The trial court refused introduction of this taxation evidence and instead ruled that any evidence of plaintiff's lost earnings would be limited to gross earnings figures. (R. V13, 47.) In addition, the trial court gave, over objection, an instruction that allowed the jury to award damages against both defendants for "loss of a normal life." (R. V13, 54-55, 226.)

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[1] Plaintiff's husband received a $90,000 judgment against CUS on a common law loss-of-consortium claim.

Appellate Court Initially Grants Both Defendants A New Trial As To Damages.

The Illinois Appellate Court initially affirmed the liability verdicts but awarded both defendants a new trial on the issue of damages (App. 54), holding, *inter alia*, that:

- The trial court committed reversible error in failing to follow this Court's holding in *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755 (1980) (it is error to exclude evidence offered to show the effect of income taxes on a plaintiff's estimated future earnings in an FELA case). (App. 14-15, 45-46.)
- The trial court also erred in instructing the jury that it could award plaintiff damages for "loss of enjoyment of life" and "pain and suffering," because under the federal law of damages, "loss of a normal life" should not be considered separately as an independent ground for damages. (App. 17-18, 48.)

Appellate Court Permits Amtrak A Set-off On Retrial For The Long-Term Disability Policy Under Which Plaintiff Is Receiving Benefits— But Limits Set-off To The Amount Of Premiums.

The appellate court further held that on retrial, Amtrak is entitled to a set-off attributable to a long-term disability insurance policy it purchased for plaintiff. At the conclusion of plaintiffs' case-in-chief, defense counsel had informed the trial court that Mrs. Van Holt had been approved for long-term disability benefits under an insurance policy covering Amtrak and CUS employees that would pay her 60% of her salary until retirement

age. (App. 21, 51-52.) The trial court ruled that the evidence of such benefits would be excluded.

Defendants objected to this ruling in their post-trial motion, and moved the court to set off from the verdict the amount of benefits already paid and the amount which plaintiff will receive in the future. (R.V5, C1232.) Defendants attached the policy in question and an affidavit of Amtrak's Director of Compensation and Benefits, who averred that plaintiff received $4,587.50 in benefits through June 1994 and would receive $1,825 per month for as long as she remains disabled until the end of her 65th birthday. (App. 21-22, 52.) Though the appellate court held that the disability compensation issue had not been properly preserved during trial, the court nevertheless considered and ruled on the issue for purposes of the new damages trial. (App. 23, 53.)

The appellate court held that because Amtrak's intent in purchasing the disability policy was "to satisfy any liability for lost wages under F.E.L.A.," it was entitled to a set-off. (App. 23-24, 54.) However, the court, citing Judge Friendly's concurring opinion in *Blake v. Delaware & Hudson Railway Co.*, 484 F.2d 204, 207 (2d Cir. 1973), held that Amtrak's set-off would be limited to "only the premiums, not what the premiums bought" because there was no "specific provision in the collective bargaining agreement" permitting a full-benefits set-off. (App. 24, 54.) Mrs. Van Holt, a management employee, was not a union member.

Appellate Court Denies Rehearing But Modifies Opinion, Affirming Judgment Against CUS Entirely And Ordering A New Trial Only As To Amtrak For FELA Damages

Amtrak moved for rehearing of the appellate court opinion, asserting that its set-off for plaintiff's long-term disability benefits should not be limited to premiums paid. Plaintiff moved for rehearing, asserting that the damages errors pertained only to Amtrak's damages under the FELA and that the joint and several judgment against CUS should be affirmed in its entirety. On denial of both rehearing motions (App. 28), the appellate court modified its opinion, affirming the judgment in its entirety as to CUS, and holding that only Amtrak is entitled to a new damages trial under the FELA. (App. 24.)

Because plaintiff had previously acceded to imposition of the FELA measure of damages to both defendants, no Supremacy Clause issue arose until this modified appellate court opinion was issued. Defendants accordingly raised their Supremacy Clause argument for the first time by asserting it as a ground for review in their Petition for Leave to Appeal to the Illinois Supreme Court. (App. 57.)

On December 4, 1996, the Illinois Supreme Court denied the Petition for Leave to Appeal. (App. 25.)

REASONS FOR GRANTING THE WRIT

I.

THIS COURT'S DECISION IS NECESSARY TO ACHIEVE UNIFORM TREATMENT OF DISABILITY BENEFITS IN FELA CASES.

The Court has repeatedly held that the FELA must have uniform application across the country. *See, e.g., Burnett v. New York Central R.R.*, 380 U.S. 424, 433, 85 S. Ct. 1050, 1057 (1965); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361, 72 S. Ct. 312, 314 (1952). This rule is necessary to effectuate a major purpose behind enactment of the FELA—to ensure that a railroad's liability for injuries to its employees does not vary from state to state and circuit to circuit. *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 493 n.5, 100 S. Ct. 755, 757 n.5 (1980); *Brady v. Southern Ry.*, 320 U.S. 476, 479, 64 S. Ct. 232, 234 (1943); *New York Central R.R. v. Winfield*, 244 U.S. 147, 150, 36 S. Ct. 546, 547 (1917); *Second Employers' Liability Cases (Mondou v. New York, New Haven & Hartford R.R.)*, 223 U.S. 1, 51, 32 S. Ct. 169, 175 (1912). However, as exemplified by this case, the treatment of long-term disability payments in FELA cases has been anything but uniform.

The cases agree this far—where disability payments are conferred on an employee as part consideration for employment, the benefits stem from the employee's labors and will be deemed a collateral source. *Folkestad v. Burlington Northern, Inc.*, 813 F.2d 1377, 1381 (9th Cir. 1987). In such a case, set-off is not allowed because it would enable the employer to avoid FELA liability altogether, a result prohibited by § 5 of the FELA. 45 U.S.C. § 55 (1988). But where the employer purchases

the disability insurance voluntarily with the intent to satisfy its FELA liability, and not in consideration for the employee's labors, the insurance is not a collateral source and set-off is allowed. *Folkestad*, 813 F.2d at 1380-81. To prohibit set-off in such a case would bestow a double recovery on a plaintiff (who would receive disability insurance payments and FELA damages for future wages) and impose double liability on an employer (who will have paid not only for the disability benefits but for the lost wages those benefits were intended to replace). *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 450-51 (8th Cir. 1984).

Furthermore, the requisite intent can be found either in the collective bargaining agreement (for union employees), *Burlington Northern R.R. v. Strong*, 907 F.2d 707, 714 (7th Cir. 1990), or in the disability insurance plan or policy itself (for non-union employees), *Fogg v. National R.R. Passenger Corp.*, 585 A.2d 786, 792 (D.C. 1991).

Thus, the appellate court here properly looked to Amtrak's long-term disability policy which provides Mrs. Van Holt (a non-union employee) with $1,825 a month and which expressly states that its purpose is for the employer:

> to use its benefits (which are not a collateral source because they are provided as an employment benefit at no cost to the employee) to satisfy any liability for lost wages under F.E.L.A. to a disabled or injured employee covered by this contract and for the Employer to avoid duplicate liability under both this contract and F.E.L.A.

(App. 23.) The appellate court then correctly concluded:

> This policy language clearly demonstrates that defendants undertook to indemnify themselves against possible liabilities under the FELA. It does not appear that the fund was established for any independent reason.

(App. 24.)

However, the appellate court then held that the only benefit that Amtrak could derive from this disability policy was the right to set off from the judgment the "premiums paid" under the policy. This was despite the appellate court's conclusion that Amtrak's stated intent was to use the disability payments "to satisfy any liability for lost wages under F.E.L.A." (App. 23.)

A. The Treatment Of Disability Benefits In FELA And Jones Act Cases Varies From State To State And Circuit To Circuit.

Review of FELA and Jones Act (46 U.S.C. § 688 (1982)) cases across the country shows that the Illinois Appellate Court's "premium only" set-off rule is a minority view contrary to numerous decisions of other state and federal courts. Indeed, no fewer than four disparate views of how to treat long-term disability benefits can be identified in the case law, as follows:

1. Railroad Or Maritime Employer Entitled To A Set-Off Or Reduction For Benefits Actually Paid.

Clark v. Burlington Northern, Inc., 726 F.2d 448, 451 (8th Cir. 1984), *Allen v. Exxon Shipping Co.*, 639 F. Supp. 1545, 1549 (D. Me. 1986), *Fogg v. National Railroad Passenger Corp.*, 585 A.2d 786, 793-94 (D.C. 1991),

and *Phillips v. Western Co. of North America*, 953 F.2d 923, 931 (5th Cir. 1992) (Jones Act), all allow the employer a full set-off for the disability benefits paid.

In *Fogg v. National Railroad Passenger Corp.*, 585 A.2d 786 (D.C. 1991), the plaintiff, as here, was an Amtrak management employee and so there was no collective bargaining agreement. The court looked to "the text of the insurance or disability plan itself," *id.* at 792, and held that "the trial judge did not err in concluding that Amtrak intended the long-term disability insurance to supplement FELA payments . . . [and thus] properly excluded evidence of the loss of income for which plaintiff was still being compensated," *id.* at 794.

The sound rationale of these majority cases is well-stated in *Folkestad v. Burlington Northern, Inc.*, *supra*, 813 F.2d at 1380 (citation omitted):

> [T]he overall concern of [45 U.S.C. § 55] is that an "employee be compensated to the full extent of his loss, not that an employer be precluded from indemnifying himself against potential FELA liability as, for instance, by carrying liability insurance coverage."

2. Railroad Or Maritime Employer Entitled To A Set-Off Or Reduction For Benefits Actually Paid And The Present Value Of Benefits To Be Paid In The Future.

In *Allen v. Exxon Shipping Co.*, 639 F. Supp. 1545 (D. Me. 1986), the court held that in situations like the case at bar, where the employee has already received benefits under a disability plan and is entitled to such continued benefits in the future, the employer is entitled to a set-

off for the amount of benefits already paid *plus* a set-off for future payments computed in a fashion "consistent with the basis of the jury's computation of future damages." 639 F. Supp. at 1550. Under the FELA, the jury is to compute and award only the present value of plaintiff's future loss and earnings. *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409, 411-12, 105 S. Ct. 1347, 1348-49 (1985) (per curiam). Thus, in this case, Amtrak's post-trial submissions included evidence of the present value of the future disability benefits plaintiff was expected to receive. (R. V7, C1665-66.)

3. Railroad Or Maritime Employer Entitled To Set-Off But Only For The Amount Of The Premium Paid For The Employee Benefits In Question.

In contrast to the above decisions, some courts have held that the employer's set-off may not include any of the benefits paid or to be paid to the employee under the long-term disability plan; rather set-off is limited to "the fraction of premium payments which might be traced to insurance for the particular employee or accident involved." *See generally Folkestad v. Burlington Northern, Inc.*, 813 F.2d 1377, 1382 n. 5 (9th Cir. 1987) (discussing conflicting case law).

4. Railroad Or Maritime Employer Entitled To Set-Off For The Entire Amount Of Premium Paid For The Disability Policy.

Other courts have concurred that set-off is limited to premiums paid but have indicated a broader view of the amount of the set-off, holding that "the employer's total

contributions to the fund [are] the outer limit of set-off."[2] *Folkestad v. Burlington Northern, Inc.*, 813 F.2d 1377, 1382 n. 5 (9th Cir. 1987); *Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1020 (9th Cir. 1973).

B. A "Premium Only" Set-Off Rule Serves As A Disincentive To Purchase Disability Insurance.

The Illinois Appellate Court's adoption of a "premium only" set-off rule should be reviewed by this Court, not only because it conflicts with the majority view of other jurisdictions but because such a rule would serve as a disincentive for railroad or maritime employers to purchase disability insurance for their employees. If set-off is limited only to the amount of the premium paid for the particular employee involved, Amtrak's intent "to satisfy any liability for lost wages under F.E.L.A." (App. 23) is frustrated and Amtrak will have gained no benefit at all by purchasing disability insurance.

Indeed, if all that Amtrak or any other employer can expect to receive is a refund of premiums paid for an employee's long-term disability policy, then it is ultimately in the same position it would have been in had it not bothered to pay the premium and buy the disability policy in the first instance. In such a system, neither Amtrak nor any other employer could "indemnify [itself] against possible liabilities under the FELA" (App. 24), even though that was the expressly stated purpose of acquiring the insurance policy in the first instance.

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[2] The appellate court opinion is unclear as to which of these two recognized premium set-off rules it is adopting.

The appellate court stated that it adopted the minority "premium only" set-off rule because there was no contrary provision in the collective bargaining agreement, citing Judge Friendly's concurrence in *Blake v. Delaware & Hudson Railway Co.*, 484 F.2d 204, 207 (2d Cir. 1973). *Blake* involved medical payments to a *union* employee from a disability insurance plan. As set forth above, numerous courts have held that in cases involving non-union employees, the requisite intent for set-off may be found in the disability insurance plan itself—as it was here. Obviously, there is no legal or logical basis to have the amount of the set-off turn in the happenstance of whether or not the injured employee is a union employee or a management employee.

C. The Decisions Are Also In Conflict As To How Evidence Of Disability Benefits Is To Be Received By The Trial Court.

The cases are not only in conflict as to what amounts an employer may set off for a railroad or maritime employee's long-term disability benefits, but how that set-off is to be achieved. Some courts have held that the amount of past payments received under the disability plan is to be withheld from the jury, and then subsequently set-off from the verdict by the court. *E.g., Fogg, supra*, 585 A.2d at 794. Other courts have held that the reduction is to be effected by deducting the amount of the set-off from the amount of damages the plaintiff is otherwise entitled to claim from the jury. *E.g., Gonzalez v. Indiana Harbor Belt R.R.*, 638 F. Supp. 308, 310 (N.D. Ind. 1986). Still other courts have held that the matter is for the jury's consideration, particularly where there is a claim for set-

off of future disability payments. *Allen v. Exxon Shipping Co.*, 639 F. Supp. 1545, 1549-50 (D. Me. 1986).

In sum, the handling of long-term disability benefits under the FELA and the Jones Act is an issue that cries out for this Court's review and for adoption of a uniform rule that can then be fairly, equitably and uniformly applied to all FELA and Jones Act claimants across the country. An FELA or Jones Act employee's future wage loss claim should not be computed differently depending on the state or circuit in which the accident happened. This Court has previously granted certiorari for the express purpose of restoring uniformity in the administration of the FELA. *E.g., Davis v. Virginian Ry.*, 361 U.S. 354, 355, 80 S. Ct. 387, 388 (1960); *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 295, 70 S. Ct. 105, 106 (1949). Amtrak respectfully requests that it do so again on this fundamental and recurring issue of long-term benefits in FELA and Jones Act cases.

II.

THIS CASE ALSO PRESENTS A FUNDAMENTAL ISSUE UNDER THE SUPREMACY CLAUSE WHICH ARISES WHENEVER AN FELA CLAIM IS JOINED WITH A COMMON LAW CLAIM.

In this case, plaintiff filed an FELA action against her employer Amtrak and a common law action against Chicago Union Station, where the accident occurred. However, she chose to try the case as a joint and several liability case against both defendants. To that end, she submitted, and the trial court gave, an instruction setting forth the same elements and measure of damages against both defendants (R. V5, C1164) and a verdict

form obligating the jury to return the same amount of damages against both defendants (R. V5, C1196-97).[3]

Plaintiff was fully cognizant that this joinder of her FELA and common law actions meant that the FELA measure of damages applied to both defendants. Thus, plaintiff acceded to a jury instruction based on *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755 (1980) (R. V5, C1161; V13, 18-23, 43-47), informing the jury that any damage award against the defendants would not be subject to income taxes, even though such an instruction is contrary to Illinois common law. *See Klawonn v. Mitchell*, 105 Ill.2d 450, 457-58, 475 N.E.2d 857, 860-61 (1985). Indeed, in her appellate court brief, plaintiff conceded that this "proffered instruction mandated by *Liepelt* was given to apply to *both the common law case* and the FELA case." (Appellee's Br. at 33 (emphasis added).)

The appellate court held that even though the above *Liepelt* income tax instruction was given as to both defendants, the trial court committed reversible error when it failed to follow the other prong of *Liepelt* and refused to permit the defendants to introduce evidence of plaintiff's taxes to establish her net income. *See Liepelt*, 444 U.S. at 493-94. The appellate court stated:

> The circuit court's ruling [excluding income tax evidence] deprived *defendants* of a fair trial on the damages issue. The measure of damages in FELA cases are federal in character even where as in the present

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[3] Plaintiff even argued to the jury that the two defendants were essentially one entity and CUS was just a "shell" of Amtrak. (R. V13, 139.)

> case the plaintiff joins her federal and common law action in one lawsuit. "The Supremacy Clause of the United States Constitution requires preemption of State laws or common law standards which conflict with Federal statutes and the execution of their full objectives." *Argueta v. Baltimore & Ohio Chicago Terminal R.R. Co.*, 224 Ill.App.3d 11, 19, 586 N.E.2d 386 (1991).

(App. 14-15 (emphasis added).)

This holding of the appellate court was consistent with this Court's jurisprudence on the supremacy of federal law in FELA actions brought in state court. Thus, in *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 369, 72 S. Ct. 312, 318 (1952), the Court stated:

> If the States afford courts for enforcing the Federal Act, they must enforce the substance of the right given by Congress. They cannot depreciate the legislative currency issued by Congress—either expressly or by local methods of enforcement that accomplish the same result. *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S. Ct. 13, 14, 68 L.Ed 143.

Indeed, this Court recently discussed the application of these principles to FELA damages law:

> As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal. Although the Court's decisions in this area "point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure,'" *Brown v. Western R. of Alabama*, 338 U.S. 294, 296, 70 S.Ct. 105, 106, 94 L.Ed. 100 (1949), *it is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of "substance" determined by federal law. Norfolk & Western R. Co. v.*

Liepelt, 444 U.S. 490, 493, 100 S.Ct. 755, 757, 62 L.Ed.2d 689 (1980).

St. Louis Southwestern Ry. v. Dickerson, 470 U.S. 409, 411, 105 S. Ct. 1347, 1348 (1985) (per curiam) (emphasis added).

Consistent with these holdings—and its ruling that the erroneous non-FELA jury instructions deprived both defendants of a fair trial (App. 14, 45)—the appellate court's initial opinion granted both Amtrak and CUS a new trial on the issue of damages. (App. 46.) However, in a revised opinion denying rehearing, the appellate court limited the new trial order to Amtrak and affirmed the judgment against CUS. (App. 15.)

The doctrine of joint and several liability "holds joint tortfeasors responsible for the plaintiff's entire injury, allowing plaintiff to pursue all, some, or one of the tortfeasors responsible for his injury for the full amount of the damages." *Coney v. J.L.G. Industries, Inc.*, 97 Ill.2d 104, 119-20, 454 N.E.2d 197, 204 (1983).

Plaintiff was free to seek imposition of such joint and several liability against the FELA defendant Amtrak and the common law defendant CUS as she did. But having made that decision, the Supremacy Clause holds her to it and requires that damages against *both* defendants be measured under the FELA. As this Court has stated, the FELA "displaces any state law trenching on the province of the Act." *South Buffalo Ry. v. Ahern*, 344 U.S. 367, 371, 73 S. Ct. 340, 342 (1953).

The trial court's error in failing to apply the appropriate FELA measure of damages infected both verdicts against both defendants. Under the Supremacy Clause, it simply cannot be otherwise. If the Supremacy Clause

required that both defendants be tried under the FELA measure of damages—as it clearly did—the Supremacy Clause cannot allow one defendant to then avoid the consequences of the trial court's failure to apply the appropriate FELA measure of damages.

The question presented in this matter can recur in any case in state or federal court where a plaintiff joins a federal law claim—*e.g.*, under the FELA or the Jones Act—with a common law claim. The need for a fair and uniform body of law, consistent with the Supremacy Clause, is a compelling reason for this Court to review this issue.

CONCLUSION

Wherefore, for the foregoing reasons, petitioners National Railroad Passenger Corporation and Chicago Union Station respectfully pray that their Petition for a Writ of Certiorari to the Illinois Appellate Court be granted and the Illinois Appellate Court be directed to reverse that portion of its opinion affirming the damages judgment against Chicago Union Station, to reverse that portion of its opinion limiting Amtrak's set-off on retrial to "premiums paid," and to remand the cause to the

Circuit Court of Cook County, Illinois for a new trial on the issue of damages as to both defendants.

Respectfully submitted,

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APPENDIX

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OPINION SOUGHT TO BE REVIEWED

NANCY E. VAN HOLT *et al.*, Plaintiffs-Appellees,
v. NATIONAL RAILROAD PASSENGER
CORPORATION *et al.*, Defendants-Appellants.

First District (2nd Division) No. 1-95-1265

Affirmed in part; reversed and remanded in part.

Opinion filed September 3, 1996,
nunc pro tunc July 30, 1996.

PRESIDING JUSTICE HARTMAN delivered the opinion of the court:

Plaintiff Nancy Van Holt sued National Railroad Passenger Corporation (Amtrak) under the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 *et seq.* (1988)), and Chicago Union Station Company (CUS), under the common law for injuries sustained when she slipped and fell in a taxi and automobile parking tunnel at Union Station. Plaintiff's husband, Louis Van Holt, also brought an action against CUS for loss of consortium.

Following trial, a jury found in favor of plaintiff and against Amtrak and CUS in the amount of $3,050,000, and in favor of Louis Van Holt and against CUS in the amount of $100,000. The jury also found plaintiff 10% at fault for the accident. The judgments were entered accordingly, and post-trial motions were denied, with the exception of a set off for medical expenses paid by defendants. Amtrak and CUS appeal, raising as issues for review whether the circuit court erred (1) in denying defendants' motion for judgment notwithstanding the verdict; (2) in allowing the testimony of plaintiffs' expert;

(3) in excluding evidence relating to the absence of prior accidents; (4) in disallowing evidence of withholding taxes on plaintiff's future income; (5) in allowing recovery of damages for "loss of enjoyment of life" and "pain and suffering" under the FELA; (6) in excluding evidence of plaintiff's failure to mitigate damages; and (7) in excluding evidence of plaintiff's right to long-term disability benefits provided by defendants. We affirm in part, reverse and remand, in part, for reasons later stated.

At noon on April 14, 1987, plaintiff, an Amtrak payroll supervisor, and Leonard Benes, another Amtrak employee, on their way to lunch, walked along an area of Union Station known as the taxi tunnel, where plaintiff was permitted to park her car. Plaintiff testified that she "slipped on a greasy, slimy slick spot" on the surface of the taxi tunnel, which was paved with cobblestones. She had been taking small steps and walking cautiously because it had been raining and the road was wet. The day was overcast, and the tunnel was very dark. Just before her fall, she turned around because she heard the "revving" of taxicab engines. After the fall, she saw dark, greasy substances on her skirt and her hands and noticed that greasy substances were dripping from the ceiling of the tunnel onto the pavement. She mentioned this to Benes.

Benes testified that he saw puddles of water and oil on the tunnel road that day. He did not see plaintiff fall because he was walking a few steps in front of her. He heard a scream, turned around, and saw her on the ground. Her shoes and keys were a few feet in front of her, her stockings were ripped, and her hands were oily and wet.

C. William Autro, general superintendent for Amtrak activities at Union Station, was responsible for operations management at CUS, formerly a wholly owned subsidiary of Amtrak. Autro testified that the taxi tunnel was an underground driveway that allowed vehicles to drop off passengers at a lower level Union Station entrance. It was CUS' responsibility to maintain and repair the taxi tunnel roadway. The taxi tunnel was a very busy roadway; taxis "tend[ed] to leak a lot of oil."

Video evidence deposition testimony of Herbert Bitting was introduced at trial. Bitting, an Amtrak engineer, testified that he was responsible for the maintenance of Union Station in the years 1985 through 1987. Lighting in the taxi tunnel was provided through sewer grates and lights in the tunnel. He described the lighting as dim, but not dark; it was sufficient during overcast days. Bitting agreed that the taxi tunnel was old and decrepit and that water seeped through the roof and walls of the tunnel. Stalactites, icicle-shaped deposits of limestone that leached from the concrete, hung from the ceiling of the tunnel. Bitting said that when stalactites fell to the ground, they were removed every night. Bitting agreed, however, that someone could slip on the accumulation of drops from the stalactites during the day. Workers occasionally knocked down the stalactites with a pole for safety reasons. Weather permitting, the taxi tunnel was washed and cleaned every night.

Plaintiffs introduced into evidence an accident report prepared by an Amtrak investigative safety committee, whose goal it was to ensure a safe working environment. The committee consisted of a peer group that investigated workplace accidents and made recommendations to management to avoid further accidents. Benes, who

was a member of the committee, prepared the accident report because he was present at the time of its occurrence.

The report stated: "The conditions of the driveway were terrible. Chuckholes, wet moist pavement, oily slimy roadbed and darkness make walk[ing] to anyone[']s car difficult." It also reported that the conditions made walking "treacherous" on rainy days and the oil slicks made the brick road "extremely dangerous." Benes testified that he did not know the extent of plaintiff's injuries at the time the committee prepared the report.

Michael Massie, a consultant in railroad practices, possessed of a degree in architecture, testified as an expert for plaintiffs. Massie had worked various odd jobs in the railroad industry and had designed parking lots for railroad facilities. He inspected the taxi tunnel in question, was of the opinions that the cobblestones made the surface of the road uneven, and that the roadway was not conducive for walking. When the roadway was converted to a combination road and parking lot, there was no adequate walking surface. The oil and grease on the road created a hazard for people walking to their cars. Defendants' motion to strike the opinion testimony, on the ground that it related to a matter of common knowledge, was denied.

Massie explained that the taxi tunnel, originally built as a two-lane road, was converted so that one lane was used for parking. The cobblestone paving was not conducive to a parking area; a smooth, anti-slip surface, such as concrete or asphalt, should have been used to prevent oil from causing a slippery surface. In addition, the lighting should have been improved to enhance the visibility for walking.

There was additional testimony regarding the extent of plaintiff's injury and damages, including her permanent disability that prevented her from working, the numerous operations for her disc and back problems, and the disruption on her family life.

At the conclusion of the trial, the jury returned a verdict against defendants and in favor of plaintiff in the amount of $3,050,000. Because plaintiff was found 10% comparatively negligent, the recoverable damages were reduced to $2,745,000. The separate loss of consortium claim of plaintiff's husband was entered against CUS in the amount of $90,000.

Pursuant to section 2-1202 of the Code of Civil Procedure (735 ILCS 5/2-1202 (West 1994)), defendants moved for judgment notwithstanding the verdict or, in the alternative, for a new trial or a substantial remittitur. The circuit court denied defendants' posttrial motion, but granted a setoff of $54,000 for medical expenses. Defendants timely filed a notice of appeal.

I

Defendants first contend that they were entitled to judgment notwithstanding the verdict because plaintiff did not prove the cause of her fall, there was no evidence as to what the black substance was, and there was no evidence to show the substance was there for a length of time sufficient for notice.

A motion for judgment notwithstanding the verdict will be granted by the circuit court whenever all the evidence, when viewed in the light most favorable to the opponent of the motion, so overwhelmingly favors the movant that no contrary verdict could ever stand. *Ped-*

rick v. Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 510, 229 N.E.2d 504 (1967); *Tierney v. Community Memorial General Hospital*, 268 Ill. App. 3d 1050, 1054, 645 N.E.2d 284 (1994). A jury's verdict will not be set aside merely because different inferences and conclusions may be drawn from conflicting testimony. *Allstate Contractors, Inc. v. Marriott Corp.*, 273 Ill. App. 3d 820, 827, 652 N.E.2d 1113 (1995).

A

As to plaintiff's asserted failure to prove a condition created by defendants to cause her fall, liability cannot be predicated upon surmise or conjecture respecting the cause of the injury. Proximate cause can be established only when there is a reasonable certainty that defendants' acts caused the injury. *Vance v. Lucky Stores, Inc.*, 134 Ill. App. 3d 166, 168, 480 N.E.2d 167 (1985) (*Vance*). If plaintiff fails to establish the element of proximate cause, she has not sustained her burden of making a *prima facie* case and a directed verdict is proper. *Vance*, 134 Ill. App. 3d at 168. Causation need not be shown by direct evidence, however, but may be established by facts and circumstances which, in the light of ordinary experience, reasonably suggest that defendants' negligence produced the injury. *Canzoneri v. Village of Franklin Park*, 161 Ill. App. 3d 33, 41, 513 N.E.2d 1103 (1987).[1]

---

[1] The same standards are applicable in plaintiff's FELA suit against Amtrak. Under the provisions of the FELA, railroads have a nondelegable duty to provide their employees with a safe place to work. Liability is imposed on the employer for injury to the employee caused "in whole or in part" by the employer's negligence. *Howes v. Baker*, 16 Ill. App. 3d 39, 44, 305 N.E.2nd 689 (1973).

Defendants rely upon *Kimbrough v. Jewel Cos.*, 92 Ill. App. 3d 813, 416 N.E.2d 328 (1981), and *Vance* to support their argument that plaintiff did not prove causation. In *Kimbrough*, plaintiff testified that she did not know what caused her to fall, but that there appeared to be grease spots on the ramp where she fell. The court stated that summary judgment was proper against plaintiff because she did not prove that a condition created by defendant caused her fall, the grease spots on the ramp did not appear to be where she was walking, and she never felt the grease to see if it was wet. *Kimbrough*, 92 Ill. App. 3d at 816, 818. In *Vance*, plaintiff sustained injuries as a result of falling at defendant's store while shopping. Plaintiff did not know what caused her to fall. In the absence of any evidence as to what caused plaintiff's fall, the court held that the circuit court properly granted defendant's motion for a directed verdict. *Vance*, 134 Ill. App. 3d at 169.

By contrast, in the case *sub judice,* plaintiff testified that she "slipped on a greasy, slimy slick spot" that was on the road where she was walking. The bricks on the road were wet and she was taking "very small steps" and walking "cautiously." After the fall, she had dark, greasy substances on her skirt and hands. She also noticed that greasy substances were dripping from the roof of the taxi tunnel onto the pavement.

Viewing the evidence in the light most favorable to plaintiffs, the circuit court properly denied defendants' motion for judgment *n.o.v.* Plaintiff provided direct testimony that the greasy substance caused her fall, and there was circumstantial evidence in the form of the dripping substance from the roof and the substance found on her skirt and hands, which was more than

sufficient evidence for the jury to conclude that this substance caused her fall.

B

Defendants next claim that there was no evidence that the dark substance was on the road for a sufficient amount of time in order to have provided sufficient notice.

Whether defendant breached its duty to plaintiff is a question of fact for the jury. *Maschhoff v. National Super Markets, Inc.*, 230 Ill. App. 3d 169, 175, 595 N.E.2d 665 (1992). Liability will be imposed where a business invitee is injured by slipping on a foreign substance on business premises if (1) the substance was placed there by the negligence of the proprietor, (2) the proprietor's servant knew of its presence, or (3) the substance was there a sufficient length of time so that in the exercise of ordinary care its presence should have been discovered. *Maschhoff*, 230 Ill. App. 3d at 175.

Here, Autro, the general superintendent for Amtrak activities at Union Station, testified that the taxis in the tunnel "tend to leak a lot of oil." Bitting, an Amtrak engineer in charge of maintenance at Union Station, stated that the light in the tunnel was dim, water leaked through the walls and roof of the tunnel, and stalactites dripped from the roof and fell to the ground. He also acknowledged the possibility that someone could step on the accumulation of drops from the stalactites during the day. Although the taxi tunnel was cleaned every day, plaintiffs' expert testified that the cobblestone road in the tunnel was an inadequate walking surface and that the oil on the road created a hazardous condition for all pedestrians.

In *Miller v. National Ass'n of Realtors,* 271 Ill. App. 3d 653, 648 N.E.2d 98 (1994), plaintiff slipped on a piece of cardboard that was on a loading ramp while delivering beer kegs to Billy Goat tavern. Evidence was presented that there was always some type of debris or dirt present on the ramp. The court held that the perpetual dirt, debris, and slipperiness on the ramp, as well as evidence that others had complained of the situation, were sufficient to create a jury question on the issue of defendant's notice of the loose piece of cardboard. *Miller,* 271 Ill. App. 3d at 657.

The case *sub judice* is analogous to Miller because there was evidence here that defendants were aware the hazardous conditions in the taxi tunnel persisted and yet took no remedial action. Viewing the evidence in the light most favorable to plaintiffs, it cannot be said that it so overwhelmingly favors defendants that no contrary verdict could ever stand.

The banana peel and lettuce leaf cases cited by defendants are inapposite because they do not involve recurring and persistent conditions, such as the dripping stalactites and the leaking oil of the taxis, which are present in the instant case. Similarly, the cases from other jurisdictions involving pedestrians who slip on oil in parking lots may be distinguished because here additional hazards were created by the cobblestone road and the drips of stalactite from the tunnel's roof. See, *e.g., Whitmore v. Sears, Roebuck & Co.*, 89 Mich. App. 3, 279 N.W.2d 318 (1979).

The circuit court did not err in denying defendants' motion for judgment notwithstanding the verdict.

II

Defendants submit that the circuit court erred in allowing the opinions of plaintiffs' expert, Massie, because some related to a matter of common knowledge and others were improper legal opinions.

Expert testimony is admissible if the proffered witness is qualified as an expert in a field that has at least a modicum of reliability, and the testimony will tend to assist the trier of fact to understand the evidence or determine a fact in issue. *Dotto v. Okan*, 269 Ill. App. 3d 808, 810, 646 N.E.2d 1277 (1995). At one time, expert testimony was inadmissible if it pertained to matters within the knowledge or experience of jurors, but the modern rule makes admissibility of such testimony determinable solely on the basis of assisting the trier of fact. M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 702.4, at 556 (6th ed. 1994). See also *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343, 365, 603 N.E.2d 449 (1992); *Anderson v. Chesapeake & Ohio Ry. Co.*, 147 Ill. App. 3d 960, 975, 498 N.E.2d 586 (1986) *(Chesapeake & Ohio Ry.)*. The admission of expert testimony is within the circuit court's discretion and will not be reversed on appeal absent an abuse of discretion. *People v. Mehlberg*, 249 Ill. App. 3d 499, 533, 618 N.E.2d 1168 (1993).

Defendants maintain that Massie's testimony regarding the uneven surface of the cobblestone road, the slickness of the oil, and the inadequate lighting conditions was inadmissible because it related to matters within the common knowledge of jurors. The only question, however, is whether the testimony aided the jury in understanding the evidence. Massie had a professional degree in architecture and had designed parking lots for rail-

road facilities. In his opinion, the cobblestone surface of the roadway was not conducive to safe walking. Moreover, he believed that a smooth, anti-slip surface, such as concrete or asphalt, should have replaced the cobblestone road to decrease the likelihood of slipping on the oil that leaked from cars. These opinions could have assisted the jury in understanding the facts at issue. The circuit court did not abuse its discretion in allowing this testimony.

The second part of defendants' argument is that Massie improperly was allowed to render legal opinions.

After Massie gave his opinion that an anti-slip surface should have been used in the taxi tunnel, he was asked about his familiarity with the FELA. Defendants objected that he was not an expert in legal matters, but the circuit court overruled the objection. Massie responded that he had consulted on cases involving the FELA and railroad workers and that he was familiar with its rules and regulations. He added that he was familiar with the industry's safety and parking practices under the FELA. He stated his opinion, over defendants' objection, that the parking facility in the taxi tunnel did not provide railroad employees with a safe place to function or work. Massie then stated his opinion that, in terms of the employer's obligation to provide a safe place to work under the FELA, it made no difference whether the taxi tunnel was owned by Amtrak or CUS because CUS was a subsidiary of Amtrak and it had the capability of controlling the workplace environment. Defendants moved for a mistria[1], which the circuit court denied. Massie concluded that if the surface of the roadway could not have been changed in April 1987, it never should have been converted to a parking facility.

Defendants cite *Coyne v. Robert H. Anderson & Associates, Inc.*, 215 Ill. App. 3d 104, 574 N.E.2d 863 (1991) *(Coyne)*, in support of the proposition that Massie's legal conclusions improperly invaded the province of the jury. In *Coyne*, the testimony of plaintiff's expert went to the ultimate issue of fact in the case, whether defendant was a "person having charge of" the work. The court held that whether defendant was in "charge of" the work was a factual determination to be made by the jury and that the expert improperly invaded an area within the common knowledge of the average juror. *Coyne*, 215 Ill. App. 3d at 112.

Massie's testimony in this case did not concern an interpretation of the FELA; rather, it consisted of his opinion that the parking facility in the taxi tunnel did not provide railroad employees with a safe place to function or work. Although this opinion related to the ultimate issue of the case, defendants' negligence, this type of testimony has been allowed. See *Merchants National Bank v. Elgin, Joliet & Eastern Ry. Co.*, 49 Ill. 2d 118, 122, 273 N.E.2d 809 (1971) (expert may testify to the ultimate issue in the case because the jury is free to reject that opinion).

With respect to Massie's testimony concerning the legal relationship of CUS and Amtrak, defendants have not shown how this testimony affected the outcome of the case (see *Atkins v. Thapedi*, 166 Ill. App. 3d 471, 477, 519 N.E.2d 1073 (1988)), especially in light of Autro's testimony that CUS was a wholly owned subsidiary of Amtrak.

The circuit court did not abuse its discretion in allowing the expert testimony.

III

Defendants maintain that the circuit court erred in excluding evidence of the absence of any prior accidents in the taxi tunnel area.

Generally, evidence of the absence of prior accidents is proper only if the offering party lays a proper foundation by establishing that such absence took place under conditions substantially similar to those surrounding the accident sued upon. *Parson v. City of Chicago,* 117 Ill. App. 3d 383, 388, 453 N.E.2d 770 (1983) *(Parson).* This evidence is admissible to show lack of notice of a dangerous condition or that the situation was not hazardous. *Gallick v. Novotney,* 124 Ill. App. 3d 756, 759, 464 N.E.2d 846 (1984).

In *Parson,* the court held that the circuit court properly refused to allow testimony that 300 to 400 vehicles had traveled down a certain street and that there were no accidents, although some cars had hit a pothole that had caused an accident in that case. 117 Ill. App. 3d at 388-89. The court stated that evidence of absence of accidents has less probative value than evidence of previous accidents, usually involves generally unreliable negative evidence, and does not tend directly to prove absence of negligence. But see *Schaffner v. Chicago & North Western Transportation Co.,* 129 Ill. 2d 1, 40-41, 541 N.E.2d 643 (1989).

The *Parson* case is similar to the case *sub judice.* Here, the evidence of a lack of prior falls could hardly establish proper maintenance of the taxi tunnel, where there was undisputable evidence that water seeped through the roof and walls, the road surface was made of cobblestones, and stalactites leached from the concrete and

dripped onto the ground, and taxicabs deposited oil on the road surface. Amtrak's Bitting himself acknowledged the possibility that someone could step on the accumulation of drops on the ground from the stalactites.

Although the circuit court would have been within its discretion to allow evidence of no prior accidents, it cannot be said that the court abused its discretion in barring this evidence. There was no error.

IV

Defendants argue that they should have been permitted to introduce evidence of taxes to be withheld from plaintiff's future earnings.

Prior to closing argument, defendants moved *in limine* that damages for lost wages be limited to plaintiff's net wages, not her gross wages. The circuit court ruled that the evidence concerning wage loss would be gross earnings. Plaintiff's final salary at Amtrak was $50,800, with additional annual fringe benefits of $6,858. During closing argument, plaintiff told the jury to multiply the sum of these amounts by the expected remainder of her working life, 22 years, which equals $1,268,476. The jury awarded her $1,246,000 for future lost earnings.

The circuit court's ruling deprived defendants of a fair trial on the damages issues. The measure of damages in FELA cases are federal in character, even where, as in the present case, plaintiff joins her federal and common law action in one lawsuit. "The supremacy clause of the United States Constitution requires preemption of State laws or common-law standards which conflict with Federal statutes and the execution of their full objectives." *Argueta v. Baltimore & Ohio Chicago Terminal R.R. Co.*,

224 Ill. App. 3d 11, 19, 586 N.E.2d 386 (1991). Accordingly, federal evidentiary principles must be applied in the FELA claim.

In *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 62 L. Ed. 2d 689, 100 S. Ct. 755 (1980), the United States Supreme Court held that it was error to exclude evidence offered to show the effect of income taxes on plaintiff's estimated future earnings in a FELA case. The Court stated: "It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss ***." *Liepelt*, 444 U.S. at 493-94, 62 L. Ed. 2d at 693-94, 100 S. Ct. at 757. See also *Oltersdorf v. Chesapeake & Ohio R.R. Co.*, 83 Ill. App. 3d 457, 464, 404 N.E.2d 320 (1980).

In this case, Amtrak, the sole defendant in the FELA claim, should have been allowed to show the effect of income taxes on plaintiff's estimated future earnings. Plaintiffs' argument that taxes withheld do not always approximate actual taxes paid does not persuade. In *Liepelt*, the Court explained that uncertainty in estimating future income-tax liabilities is not a sufficient reason to reject the introduction of such evidence. *Liepelt*, 444 U.S. at 494, 62 L. Ed. 2d at 694, 100 S. Ct. at 758.

The circuit court erred in barring this evidence, and Amtrak is entitled to a new trial on the issue of damages with respect to the FELA claim.[2]

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[2] In cases brought under state law, gross earnings, not net, is the proper figure to use in computing earning capacity. *Exchange National Bank v. Air Illinois, Inc.*, 167 Ill. App. 3d

(continued...)

V

Defendants next contend that the circuit court erred in instructing the jury that they could award plaintiff damages for "loss of enjoyment of life" and "pain and suffering."

During the jury instruction conference, plaintiffs tendered Illinois Pattern Jury Instructions, Civil, Nos. 30.01, 30.04, 30.05, 30.06, 30.07 (3d ed. 1994) (hereinafter IPI Civil 3d), which stated:

> "If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate [her] for any of the following elements of damages ***:
>
> The reasonable expense of necessary medical care, treatment, and services received.
>
> Future lost earnings.
>
> Loss of a normal life.
>
> Pain and suffering.
>
> Whether any of these elements of damages has been proved by the evidence is for you to determine."

The jury awarded plaintiff, in part, $875,000 each for loss of a normal life and pain and suffering.

In the interpretation of a federal statute, the decisions of the federal courts are controlling on Illinois courts. *Golden Bear Family Restaurants, Inc. v. Murray,* 144 Ill. App. 3d 616, 619-20, 494 N.E.2d 581 (1986); *Arnold v.*

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[2] (...continued)
1081, 1091-92, 522 N.E.2d 146 (1988); *McCann v. Lisle-Woodridge Fire Protection District*, 115 Ill. App. 3d 702, 706-07, 450 N.E.2d 1311 (1983).

Babcock & Wilcox Co., 154 Ill. App. 3d 863, 870, 507 N.E.2d 218 (1987), *aff'd*, 123 Ill. 2d 67, 525 N.E.2d 59 (1988). In *Dugas v. Kansas City Southern Ry. Lines*, 473 F.2d 821, 827 (5th Cir. 1973), the court held that under the FELA, damages for loss of a normal life "are to be included as a part of pain, suffering, and inconvenience. It is not a factor to be separately measured as an independent ground for damages." In *Earl v. Bouchard Transportation Co.*, 917 F.2d 1320, 1326 (2d Cir. 1990), a case brought under the Jones Act (46 U.S.C. § 688 (1982)), the court cited *Dugas* and explained that "no matter how [this] issue is decided, *** the result should have no effect on awards by a properly instructed jury." The court reasoned that damages for loss of a normal life are a compensable item to be included somewhere in the total damage award. Therefore, whether damages for loss of life are included in the damages calculated for pain and suffering, or are calculated separately, the total damages awarded by the jury should be the same. *Earl*, 917 F.2d at 1326-27.

In the case *sub judice*, the circuit court relied on *Smith v. City of Evanston*, 260 Ill. App. 3d 925, 936-38, 631 N.E.2d 1269 (1994), a case brought under state law, where this court held that the jury should be instructed to award damages for "loss of a normal life" as a separate element because it is less likely to be misunderstood than if it were included in the blanket category of "disability."

Although the damage award of $875,000 for loss of a normal life may not have been duplicative, upon retrial of the FELA claim against Amtrak, deference should be given to the federal character of this FELA suit and damages considered according to principles governing

such actions. Accordingly, "loss of a normal life" should not be considered separately as an independent ground for damages.

VI

Defendants identify error in the circuit court ruling that they could not present evidence of plaintiff's failure to mitigate damages by not losing weight and refusal to submit this issue to the jury, especially where plaintiffs opened the door to this issue.

Video evidence deposition testimony of Dr. James Ahstrom was introduced at trial. The transcript of the evidence deposition was attached to defendants' post-trial motion. In that deposition transcript, Dr. Ahstrom, an orthopedic surgeon, testified that he treated plaintiff, beginning in April 1987. He estimated that in June 1987, plaintiff weighed over 300 pounds. He performed a diskectomy and an inner body fusion on plaintiff in November 1987 to relieve pressure the disc was causing on the nerve. Following surgery, plaintiff "had a fair amount of discomfort" and continued to experience pain. Following an office visit about a month after surgery, Dr. Ahstrom described plaintiff as "doing pretty well" and all in all, "doing beautifully."

By February 1988, plaintiff had returned to work full time and had lost 85 pounds. In April 1989, additional surgery was performed on plaintiff to relieve pressure on the nerve. Following that surgery, she experienced better feeling in the left lower extremity, but she still needed medication for her pain. Dr. Ahstrom did not believe that her condition would improve or that anything could be done to improve it. At some indeterminate time in the

future, plaintiff's weight increased about 125 pounds. With regard to plaintiff's obesity, Dr. Ahstrom testified that when plaintiff was first hospitalized the hospital nutritionist gave her a weight reduction diet. Dr. Ahstrom also recommended that she lose weight. He believed that her weight problem made it difficult for her to get well and contributed to the unsuccessful results of her surgeries.

Prior to trial, the circuit court ruled that evidence of plaintiff's weight would not be allowed to establish liability in the case or to show that the operations were more difficult, but reserved ruling on whether it would be allowed to show a failure to mitigate. The court and the parties subsequently edited the deposition of Dr. Ahstrom for the purpose of determining which portions would be presented to the jury. The court ruled that evidence relating to plaintiff's weight would not be allowed to show her failure to mitigate because it was speculative. The court noted that it was unclear from Dr. Ahstrom's deposition whether the nutritionist was assigned to plaintiff because of her obesity or if it was common hospital practice to do so; whether she was prescribed a particular weight loss program and, if so, whether she followed it; and to what extent her weight limited her ability to recover from her injuries.

At trial, plaintiffs introduced the video evidence deposition testimony of Carol Gordon, which the parties previously edited by agreement. At the conclusion of that showing, defendants moved to reopen the deposition of Dr. Ahstrom because Gordon was permitted to testify via video deposition that losing weight would not have improved plaintiff's condition. The circuit court denied defendants' request, stating that it had not even read the

deposition before it was played to the jury and defendants themselves agreed to the substance of the deposition presented to the jury. The court said that it would not change the posture of the case because defendants should have objected before the tape was played to the jury.

A party who procures, invites, or acquiesces in the admission of improper evidence cannot complain with respect to the admission of said evidence. *Hamrock v. Henry,* 222 Ill. App. 3d 487, 495, 584 N.E.2d 204 (1991). Here, defendants cannot complain of the evidence allowed in Gordon's deposition testimony where they acquiesced in its admission.

Under the FELA, a party has a duty to mitigate damages, and defendant is entitled to an instruction if there is record evidence to support it. *Brown v. Chicago & North Western Transportation Co.,* 162 Ill. App. 3d 926, 932, 516 N.E.2d 320 (1987). See also *Khatib v. McDonald,* 87 Ill. App. 3d 1087, 1095, 410 N.E.2d 266 (1980) (Illinois law). In *Muller v. Lykes Bros. Steamship Co.,* 337 F. Supp. 700, 70 (E.D. La.), *aff'd,* 468 F.2d 951 (5th Cir. 1972), the court held that plaintiff, who weighed over 300 pounds, failed to minimize damage when he discontinued treatment in a weight reduction program that was prescribed by his doctor for the express purpose of relieving stress on his injured knee. But, in *Kratzer v. Capital Marine Supp Inc.,* 645 F.2d 477, 483 (5th Cir. 1981), the court rejected the argument that plaintiff, who was overweight, failed to mitigate his damages because he did not attempt to lose weight at his doctors' suggestion. The court distinguished *Muller* because Kratzer was not placed on a doctor-administered weight reduction program and was "glibly" told by his doctors to lose

weight, although the benefits were uncertain. *Kratzer,* 645 F.2d at 483-84.

The present case is more analogous to *Kratzer.* It was unclear from Dr. Ahstrom's deposition whether the nutritionist was assigned to plaintiff because of her obesity or if it was common hospital practice to do so. Further, his testimony is unclear as to the benefit of any weight reduction. Finally, the testimony is obscure as to when plaintiff put on the additional weight, why her weight increased, and if she ever attended a weight reduction program.

The circuit court did not err in denying admission of this evidence and refusing to give the instruction.

VII

Defendants' final argument is that plaintiff's right to receive long-term disability benefits should have been permitted in evidence. Alternatively, a setoff should have been ordered to reflect the value of the future benefits plaintiff would receive.

At the conclusion of plaintiffs' case in chief, defense counsel informed the circuit court that plaintiff had been approved for long-term disability benefits under an insurance policy covering Amtrak and CUS employees that would pay her 60% of her salary annually until she reached 66 years of age. The court ruled that the evidence would be excluded.

Defendants objected to this ruling in their post-trial motion, which attached the policy in question and an affidavit of Amtrak's director of compensation and benefits, who averred that plaintiff received $4,587.50 in

benefits through June 1994 and would receive $1,825 per month "for as long as she remains disabled under contract provisions to [the] end of her 65th birthday."

Under the collateral source rule, a plaintiff may recover the full measure of damages, without setoff or credit, although she is also compensated from an independent source such as insurance. *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 449 (8th Cir. 1984) *(Clark)*. In contrast, section 55 of the FELA provides that "in any action brought against [any] common carrier ***, such common carrier may set off therein any sum it has contributed or paid to any insurance *** that may have been paid to the injured employee *** on account of the injury or death for which said action was brought." 45 U.S.C. § 55 (1988).

Although the language of section 55 appears broad enough to swallow the collateral source rule, courts have limited its scope by focusing on the provision that the covered payments be made "on account of the injury." *Clark*, 726 F.2d at 450. A distinction is drawn between those situations where payments emanate from a fringe benefit, such as a retirement fund or a general hospital and medical insurance plan, and payments where the employer has undertaken voluntarily to indemnify itself against possible liabilities under the FELA. See *Clark*, 726 F.2d at 450 (and cases cited therein). The rationale underlying this approach is that an employer who voluntarily undertakes to indemnify itself against liability by payment into a fund for that purpose should not be penalized by permitting plaintiff a double recovery, whereas an employer who makes payments into a fund established for an independent reason, such as to provide the employee a fringe benefit, should not be entitled to

benefit by setting off such amounts against his liability to the employee. *Clark*, 726 F.2d at 450.

In determining whether an amount is a fringe benefit, the important consideration is the character of the benefit received, rather than whether the employer is actually the source of the fund. *Clark*, 726 F.2d at 450. Guidance in making this determination may be found in the specific provisions of the benefits plan in issue. *Burlington Northern R.R. Co. v. Strong*, 907 F.2d 707, 713 (7th Cir. 1990).

In the instant case, it should be noted initially that defendants did not make a proper offer of proof at trial thereby enabling the circuit court to reach a correct decision. All supporting affidavits as well as the insurance policy were presented in their post-trial motion. Because the court was not adequately informed as to the substance of the proffered evidence at trial, the issue was not properly preserved. See *State Farm Fire & Casualty Co. v. M. Walter Roofing Co.*, 271 Ill. App. 3d 42, 45-46, 648 N.E.2d 254 (1995). Nevertheless, since the damages issues must be retried, the disability compensation question will be considered here.

Defendants' disability insurance policy stated, in pertinent part, that one of its purposes was

> "for the Employer to use its benefits (which are not a collateral source because they are provided as an employment benefit at no cost to the employee) *to satisfy any liability for lost wages under F.E.L.A.* to a disabled or injured employee covered by this contract and for the Employer to avoid duplicate liability under both this contract and F.E.L.A." (Emphasis added.)

This policy language clearly demonstrates that defendants undertook to indemnify themselves against possible liabilities under the FELA. It does not appear that the fund was established for any independent reason.

Plaintiff maintains that defendants are entitled to set off only the premiums paid and not the benefits received. Section 55 allows a setoff for amounts "contributed or paid to any insurance." 45 U.S.C. § 55 (1988). Judge Friendly's oft-cited concurrence in *Blake v. Delaware & Hudson Ry. Co.*, 484 F.2d 204, 207 (2d Cir. 1973), explained that railroads are entitled to set off only the premiums, not what the premiums bought, except as allowed by "specific provision in the collective bargaining agreement." Here, there was no such agreement. Accordingly, Amtrak is entitled to a setoff for premiums paid under this long-term disability policy in the new trial for FELA damages.

For the aforestated reasons, that part of the judgment assessing liability against defendants and in plaintiffs' favor is affirmed; that part of the judgment assessing damages in the state-law claims against CUS is affirmed; and that part of the judgment assessing damages in the FELA claim against Amtrak is reversed and remanded for a new trial in accordance with the views expressed in this opinion.

Affirmed in part; reversed and remanded, in part, for a new trial against Amtrak on FELA damages only.

DiVITO and BURKE, JJ., concur.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
81778 SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

December 4, 1996

Mr. Hugh C. Griffin
Lord, Bissell & Brook
115 S. LaSalle St.
Chicago, IL 60603

No. 81778 - Nancy E. Van Holt et al., respondents, v. National Railroad Passenger Corporation, etc., et al., petitioners. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 26, 1996.

[Date: September 25, 1996]

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 1-95-1265

NANCY E. VAN HOLT and LOUIS VAN HOLT,	)	Appeal from the Circuit Court of Cook County, County Department, Law Division
Plaintiffs-Appellees,	)	
v.	)	
	)	No. 89 L 04861
NATIONAL RAILROAD PASSENGER CORPORATION, a foreign corporation and CHICAGO UNION STATION COMPANY, a domestic corporation,	)	The Honorable Allen A. Freeman Judge Presiding
Defendants-Appellants.	)	

ORDER

THIS MATTER COMING ON TO BE HEARD on the Motion of Defendants-Appellants, NATIONAL RAILROAD PASSENGER CORPORATION and CHICAGO UNION STATION COMPANY, for leave to File Petition for Rehearing *Instanter*, due notice having been given and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the Motion of Defendants-Appellants for leave to file their petition for rehearing *instanter* is hereby ~~allowed~~/denied.

JUSTICE

JUSTICE

JUSTICE

Hugh C. Griffin
Hugh S. Balsam
LORD, BISSELL & BROOK
115 S. LaSalle Street
Chicago, Illinois 60603
(312) 443-0700

Robert H. Joyce
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 E. Monroe Street
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(312) 346-8000

[Date: August 29, 1996]

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NANCY E. VAN HOLT and LOUIS VAN HOLT,	)	
Plaintiffs-Appellees,	)	
v.	)	No. 1-95-1265
NATIONAL RAILROAD PASSENGER CORPORATION, a foreign corporation, and CHICAGO UNION STATION COMPANY, a domestic corporation,	)	
Defendants-Appellants.	)	

ORDER

IT IS HEREBY ORDERED THAT the opinion filed in the above captioned case on July 30, 1996, be and the same is hereby withdrawn; and a modified opinion upon denial of rehearing will be filed *nunc pro tunc* as of July 30, 1996, on September 3, 1996.

PRESIDING JUDGE ALLEN HARTMAN

JUSTICE GINO DiVITO

JUSTICE ANNE BURKE

DATE: August 29, 1996

[Date: July 11, 1994]

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

NANCY E. VAN HOLT, Plaintiff,	)	
vs.	)	No. 89 L 4861
NATIONAL RAILROAD PASSENGER CORPORATION, a foreign corporation and CHICAGO UNION STATION COMPANY, a domestic corporation, Defendants.	)	

ORDER

This matter having been tried to verdict;

IT IS HEREBY ORDERED that judgment is entered upon the jury's verdict in favor of the Plaintiff, NANCY VAN HOLT, and against the Defendants, NATIONAL RAILROAD PASSENGER CORPORATION a/k/a AMTRAK and CHICAGO UNION STATION COMPANY, in the amount of two million seven hundred forty-five thousand dollars ($2,745,000.00), plus costs.

IT IS FURTHER ORDERED that judgment is entered upon the jury's verdict in favor of LOUIS VAN HOLT and against the Defendant, CHICAGO UNION STATION COMPANY in the amount of ninety thousand dollars ($90,000.00), plus costs.

_____, 19__

ENTER:

_____

Judge Judge's No.

Atty No. 70951
Name LAW OFFICES OF DONALD J. NOLAN
Attorney for Plaintiff
Address One N. LaSalle St., 35th Floor
City Chicago, Illinois 60602
Telephone (312) 372-5400

ORIGINAL APPELLATE COURT OPINION

[Date: July 30, 1996]

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No.1-95-1265

NANCY E. VAN HOLT and LOUIS VAN HOLT,	)	
Plaintiffs-Appellees,	)	Appeal from the Circuit Court of Cook County.
v.	)	
NATIONAL RAILROAD PASSENGER CORPORATION, a foreign corporation, and CHICAGO UNION STATION COMPANY, a domestic corporation,	)	
Defendants-Appellants,	)	
and	)	
RAGNAR BENSON, INC.,	)	Honorable Allen A. Freeman, Judge Presiding.
Defendant.	)	

PRESIDING JUSTICE HARTMAN delivered the opinion of the court:

Plaintiff Nancy Van Holt sued National Railroad Passenger Corporation (Amtrak) under the Federal Employers' Liability Act (FELA) (45 U.S.C. §51 *et seq.* (1988)), and Amtrack, Chicago Union Station Company (CUS), and Ragnar Benson, Inc. under the common law for injuries sustained when she slipped and fell in a taxi and

automobile parking tunnel at Union Station.[1] Plaintiff's husband, Louis Van Holt, also brought an action against Amtrack for loss of consortium.

Following trial, a jury found in favor of plaintiff and against Amtrak and CUS in the amount of $3,050,000, and in favor of Louis Van Holt and against CUS in the amount of $100,000. The jury also found plaintiff 10% at fault for the accident. The judgments were entered accordingly, and post-trial motions were denied, with the exception of a set-off for medical expenses paid by defendants. Amtrak and CUS appeal, raising as issues for review whether the circuit court erred (1) in denying defendants' motion for judgment notwithstanding the verdict; (2) in allowing the testimony of plaintiffs' expert; (3) in excluding evidence relating to the absence of prior accidents; (4) in disallowing evidence of withholding taxes on plaintiff's future income; (5) in allowing recovery of damages for "loss of enjoyment of life" and "pain and suffering" under the FELA; (6) in excluding evidence of plaintiff's failure to mitigate damages; and (7) in excluding evidence of plaintiff's right to long-term disability benefits provided by defendants. We affirm in part, and reverse in part, for reasons later stated.

At noon on April 14, 1987, plaintiff, an Amtrak payroll supervisor, and Leonard Benes, another Amtrak employee, on their way to lunch, walked along an area of Union Station known as the taxi tunnel, where plaintiff was permitted to park her car. Plaintiff testified that she "slipped on a greasy, slimy slick spot" on the surface of the taxi tunnel, which was paved with cobblestones. She

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[1] The circuit court granted plaintiff's motion for a voluntary dismissal as to Ragnar Benson, Inc. prior to trial.

had been taking small steps and walking cautiously because it had been raining and the road was wet. The day was overcast, and the tunnel was very dark. Just before her fall, she turned around because she heard the "revving" of taxicab engines. After the fall, she saw dark, greasy substances on her skirt and her hands and noticed that greasy substances were dripping from the ceiling of the tunnel onto the pavement. She mentioned this to Benes.

Benes testified that he saw puddles of water and oil on the tunnel road that day. He did not see plaintiff fall because he was walking a few steps in front of her. He heard a scream, turned around, and saw her on the ground. Her shoes and keys were a few feet in front of her, her stockings were ripped, and her hands were oily and wet.

C. William Autro, general superintendent for Amtrak activities at Union Station, was responsible for operations management at CUS, formerly a wholly-owned subsidiary of Amtrak. Autro testified that the taxi tunnel was an underground driveway that allowed vehicles to drop off passengers at a lower level Union Station entrance. It was CUS' responsibility to maintain and repair the taxi tunnel roadway. The taxi tunnel was a very busy roadway; taxis "tend[ed] to leak a lot of oil."

Video evidence deposition testimony of Herbert Bitting was introduced at trial. Bitting, an Amtrak engineer, testified that he was responsible for the maintenance of Union Station in the years 1985 through 1987. Lighting in the taxi tunnel was provided through sewer grates and lights in the tunnel. He described the lighting as dim, but not dark; it was sufficient during overcast days. Bitting agreed that the taxi tunnel was old and decrepit

and that water seeped through the roof and walls of the tunnel. Stalactites, icicle-shaped deposits of limestone that leached from the concrete, hung from the ceiling of the tunnel. Bitting said that when stalactites fell to the ground, they were removed every night. Bitting agreed, however, that someone could slip on the accumulation of drops from the stalactites during the day. Workers occasionally knocked down the stalactites with a pole for safety reasons. Weather permitting, the taxi tunnel was washed and cleaned every night.

Plaintiffs introduced into evidence an accident report prepared by an Amtrak investigative safety committee, whose goal it was to ensure a safe working environment. The committee consisted of a peer group that investigated workplace accidents and made recommendations to management to avoid further accidents. Benes, who was a member of the committee, prepared the accident report because he was present at the time of its occurrence.

The report stated: "The conditions of the driveway were terrible. Chuckholes, wet moist pavement, oily slimy roadbed and darkness make walk[ing] to anyone[']s car difficult." It also reported that the conditions made walking "treacherous" on rainy days and the oil slicks made the brick road "extremely dangerous." Benes testified that he did not know the extent of plaintiff's injuries at the time the committee prepared the report.

Michael Massie, a consultant in railroad practices, possessed of a degree in architecture, testified as an expert for plaintiffs. Massie had worked various odd jobs in the railroad industry, and had designed parking lots for railroad facilities. He inspected the taxi tunnel in question, was of the opinions that the cobblestones made the

surface of the road uneven, and that the roadway was not conducive for walking. When the roadway was converted to a combination road and parking lot, there was no adequate walking surface. The oil and grease on the road created a hazard for people walking to their cars. Defendants' motion to strike the opinion testimony, on the ground that it related to a matter of common knowledge, was denied.

Massie explained that the taxi tunnel, originally built as a two-lane road, was converted so that one lane was used for parking. The cobblestone paving was not conducive to a parking area; a smooth, anti-slip surface, such as concrete or asphalt, should have been used to prevent oil from causing a slippery surface. In addition, the lighting should have been improved to enhance the visibility for walking.

There was additional testimony regarding the extent of plaintiff's injury and damages, including her permanent disability that prevented her from working, the numerous operations for her disc and back problems, and the disruption on her family life.

At the conclusion of the trial, the jury returned a verdict against defendants and in favor of plaintiff in the amount of $3,050,000. Because plaintiff was found 10% comparatively negligent, the recoverable damages were reduced to $2,745,000. The separate loss of consortium claim of plaintiff's husband was entered against CUS in the amount of $90,000.

Pursuant to section 2-1202 of the Code of Civil Procedure (735 ILCS 5/2-1202 (West 1994)), defendants moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, or a substantial remittitur.

The circuit court denied defendants' post-trial motion, but granted a set-off of $54,000 for medical expenses. Defendants timely filed a notice of appeal.

I

Defendants first contend that they were entitled to judgment notwithstanding the verdict because plaintiff did not prove the cause of her fall, there was no evidence as to what the black substance was, and there was no evidence to show the substance was there for a length of time sufficient for notice.

A motion for judgment notwithstanding the verdict will be granted by the circuit court whenever all the evidence, when viewed in the light most favorable to the opponent of the motion, so overwhelmingly favors the movant that no contrary verdict could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504 (1967); *Tierney v. Community Memorial General Hospital*, 268 Ill. App. 3d 1050, 1054, 645 N.E.2d 284 (1994). A jury's verdict will not be set aside merely because different inferences and conclusions may be drawn from conflicting testimony. *Allstate Contractors, Inc. v. Marriott Corp.*, 273 Ill. App. 3d 820, 827, 652 N.E.2d 1113 (1995).

A

As to plaintiff's asserted failure to prove a condition created by defendants to cause her fall, liability cannot be predicated upon surmise or conjecture respecting the cause of the injury. Proximate cause can be established only when there is a reasonable certainty that defen-

dants' acts caused the injury. *Vance v. Lucky Stores, Inc.*, 134 Ill. App. 3d 166, 168, 480 N.E.2d 167 (1985) (*Vance*). If plaintiff fails to establish the element of proximate cause, she has not sustained her burden of making a *prima facie* case and a directed verdict is proper. *Vance*, 134 Ill. App. 3d at 168. Causation need not be shown by direct evidence, however, but may be established by facts and circumstances which, in the light of ordinary experience, reasonably suggest that defendants' negligence produced the injury. *Canzoneri v. Village of Franklin Park*, 161 Ill. App. 3d 33, 41, 513 N.E.2d 1103 (1987).[2]

Defendants rely upon *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 416 N.E.2d 328 (1981), and *Vance* to support their argument that plaintiff did not prove causation. In *Kimbrough*, plaintiff testified that she did not know what caused her to fall, but that there appeared to be grease spots on the ramp where she fell. The court stated that summary judgment was proper against plaintiff because she did not prove that a condition created by defendant caused her fall, the grease spots on the ramp did not appear to be where she was walking, and she never felt the grease to see if it was wet. *Kimbrough*, 92 Ill. App. 3d at 816, 818. In *Vance*, plaintiff sustained injuries as a result of falling at defendant's store while shopping. Plaintiff did not know what caused her to fall. In the absence of any evidence

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[2] The same standards are applicable in plaintiff's FELA suit against Amtrak. Under the provisions of the FELA, railroads have a non-delegable duty to provide their employees with a safe place to work. Liability is imposed on the employer for injury to the employee caused "in whole or in part" by the employer's negligence. *Howes v. Baker*, 16 Ill. App. 3d 39, 44, 305 N.E.2d 689 (1973).

as to what caused plaintiff's fall, the court held that the circuit court properly granted defendant's motion for a directed verdict. *Vance*, 134 Ill. App. 3d at 169.

By contrast, in the case *sub judice*, plaintiff testified that she "slipped on a greasy, slimy slick spot" that was on the road where she was walking. The bricks on the road were wet and she was taking "very small steps" and walking "cautiously." After the fall, she had dark, greasy substances on her skirt and hands. She also noticed that greasy substances were dripping from the roof of the taxi tunnel onto the pavement.

Viewing the evidence in the light most favorable to plaintiffs, the circuit court properly denied defendants' motion for judgment *n.o.v.* Plaintiff provided direct testimony that the greasy substance caused her fall, and there was circumstantial evidence in the form of the dripping substance from the roof and the substance found on her skirt and hands, which was more than sufficient evidence for the jury to conclude that this substance caused her fall.

B

Defendants next claim that there was no evidence that the dark substance was on the road for a sufficient amount of time in order to have provided sufficient notice.

Whether defendant breached its duty to plaintiff is a question of fact for the jury. *Maschhoff v. National Super Markets, Inc.*, 230 Ill. App. 3d 169, 175, 595 N.E.2d 665 (1992). Liability will be imposed where a business invitee is injured by slipping on a foreign substance on business premises if (1) the substance was placed there by the

negligence of the proprietor, (2) the proprietor's servant knew of its presence, or (3) the substance was there a sufficient length of time so that in the exercise of ordinary care its presence should have been discovered. *Maschhoff*, 230 Ill. App. 3d at 175.

Here, Autro, the general superintendent for Amtrak activities at Union Station, testified that the taxis in the tunnel "tend to leak a lot of oil." Bitting, an Amtrak engineer in charge of maintenance at Union Station, stated that the light in the tunnel was dim, water leaked through the walls and roof of the tunnel, and stalactites dripped from the roof and fell to the ground. He also acknowledged the possibility that someone could step on the accumulation of drops from the stalactites during the day. Although the taxi tunnel was cleaned every day, plaintiffs' expert testified that the cobblestone road in the tunnel was an inadequate walking surface and that the oil on the road created a hazardous condition for all pedestrians.

In *Miller v. National Association of Realtors*, 271 Ill. App. 3d 653, 648 N.E.2d 98 (1994), plaintiff slipped on a piece of cardboard that was on a loading ramp while delivering beer kegs to Billy Goat tavern. Evidence was presented that there was always some type of debris or dirt present on the ramp. The court held that the perpetual dirt, debris, and slipperiness on the ramp, as well as evidence that others had complained of the situation, were sufficient to create a jury question on the issue of defendant's notice of the loose piece of cardboard. *Miller*, 271 Ill. App. 3d at 657.

The case *sub judice* is analogous to *Miller* because there was evidence here that defendants were aware the hazardous conditions in the taxi tunnel persisted and yet

took no remedial action. Viewing the evidence in the light most favorable to plaintiffs, it cannot be said that it so overwhelmingly favors defendants that no contrary verdict could ever stand.

The banana peel and lettuce leaf cases cited by defendants are inapposite because they do not involve a recurring and persistent conditions, such as the dripping stalactites and the leaking oil of the taxis, which are present in the instant case. Similarly, the cases from other jurisdictions involving pedestrians who slip on oil in parking lots may be distinguished because here additional hazards were created by the cobblestone road and the drips of stalactite from the tunnel's roof. See, *e.g.*, *Whitmore v. Sears, Roebuck & Co.*, 89 Mich. App. 3, 279 N.W.2d 318 (1979).

The circuit court did not err in denying defendants' motion for judgment notwithstanding the verdict.

II

Defendants submit that the circuit court erred in allowing the opinions of plaintiffs' expert, Massie, because some related to a matter of common knowledge and others were improper legal opinions.

Expert testimony is admissible if the proffered witness is qualified as an expert in a field that has at least a modicum of reliability, and the testimony will tend to assist the trier of fact to understand the evidence or determine a fact in issue. *Dotto v. Okan*, 269 Ill. App. 3d 808, 810, 646 N.E.2d 1277 (1995). At one time, expert testimony was inadmissible if it pertained to matters within the knowledge or experience of jurors, but the modern rule makes admissibility of such testimony de-

terminable solely on the basis of assisting the trier of fact. M. Graham, Cleary & Graham's Handbook of Illinois Evidence §702.4, at 556 (6th ed. 1994). See also *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343, 365, 603 N.E.2d 449 (1992); *Anderson v. Chesapeake & Ohio Ry. Co.*, 147 Ill. App. 3d 960, 975, 498 N.E.2d 586 (1986) (*Chesapeake & Ohio Ry.*). The admission of expert testimony is within the circuit court's discretion and will not be reversed on appeal absent an abuse of discretion. *People v. Mehlberg*, 249 Ill. App. 3d 499, 533, 618 N.E.2d 1168 (1993).

Defendants maintain that Massie's testimony regarding the uneven surface of the cobblestone road, the slickness of the oil, and the inadequate lighting conditions was inadmissible because it related to matters within the common knowledge of jurors. The only question, however, is whether the testimony aided the jury in understanding the evidence. Massie had a professional degree in architecture and had designed parking lots for railroad facilities. In his opinion, the cobblestone surface of the roadway was not conducive to safe walking. Moreover, he believed that a smooth, anti-slip surface, such as concrete or asphalt, should have replaced the cobblestone road to decrease the likelihood of slipping on the oil that leaked from cars. These opinions could have assisted the jury in understanding the facts at issue. The circuit court did not abuse its discretion in allowing this testimony.

The second part of defendants' argument is that Massie improperly was allowed to render legal opinions.

After Massie gave his opinion that an anti-slip surface should have been used in the taxi tunnel, he was asked about his familiarity with the FELA. Defendants object-

ed that he was not an expert in legal matters, but the circuit court overruled the objection. Massie responded that he had consulted on cases involving the FELA and railroad workers and that he was familiar with its rules and regulations. He added that he was familiar with the industry's safety and parking practices under the FELA. He stated his opinion, over defendants' objection, that the parking facility in the taxi tunnel did not provide railroad employees with a safe place to function or work. Massie then stated his opinion that, in terms of the employer' s obligation to provide a safe place to work under the FELA, it made no difference whether the taxi tunnel was owned by Amtrak or CUS because CUS was a subsidiary of Amtrak and they had the capability of controlling the workplace environment. Defendants moved for a mistrial, which the circuit court denied. Massie concluded that if the surface of the roadway could not have been changed in April 1987, it never should have been converted to a parking facility.

Defendants cite *Coyne v. Robert H. Anderson & Associates, Inc.*, 215 Ill. App. 3d 104, 574 N.E.2d 863 (1991) (*Coyne*), in support of the proposition that Massie's legal conclusions improperly invaded the province of the jury. In *Coyne*, the testimony of plaintiff's expert went to the ultimate issue of fact in the case, whether defendant was a "person having charge of" the work. The court held that whether defendant was in "charge of" the work was a factual determination to be made by the jury and that the expert improperly invaded an area within the common knowledge of the average juror. *Coyne*, 215 Ill. App. 3d at 112.

Massie's testimony in this case did not concern an interpretation of the FELA; rather it consisted of his

opinion that the parking facility in the taxi tunnel did not provide railroad employees with a safe place to function or work. Although this opinion related to the ultimate issue of case, defendants' negligence, this type of testimony has been allowed. See *Merchants National Bank of Aurora v. The Elgin, Joliet & Eastern Ry. Co.*, 49 Ill. 2d 118, 122, 273 N.E.2d 809 (1971) (expert may testify to the ultimate issue in the case because the jury is free to reject that opinion).

With respect to Massie's testimony concerning the legal relationship of CUS and Amtrak, defendants have not shown how this testimony affected the outcome of the case (see *Atkins v. Thapedi*, 166 Ill. App. 3d 471, 477, 519 N.E.2d 1073 (1988)), especially in light of Autro's testimony that CUS was a wholly-owned subsidiary of Amtrak.

The circuit court did not abuse its discretion in allowing the expert testimony.

III

Defendants maintain that the circuit court erred in excluding evidence of the absence of any prior accidents in the taxi tunnel area.

Generally, evidence of the absence of prior accidents is proper only if the offering party lays a proper foundation by establishing that such absence took place under conditions substantially similar to those surrounding the accident sued upon. *Parson v. City of Chicago*, 117 Ill. App. 3d 383, 388, 453 N.E.2d 770 (1983) (*Parson*). This evidence is admissible to show lack of notice of a dangerous condition or that the situation was not hazardous.

Gallick v. Novotney, 124 Ill. App. 3d 756, 759, 464 N.E. 2d 846 (1984).

In *Parson*, the court held that the circuit court properly refused to allow testimony that 300 to 400 vehicles had travelled down a certain street and that there were no accidents, although some cars had hit a pothole that had caused an accident in that case. 117 Ill. App. 3d at 388-89. The court stated that evidence of absence of accidents has less probative value than evidence of previous accidents, usually involves generally unreliable negative evidence, and does not tend directly to prove absence of negligence. But see *Schaffner v. Chicago & North Western Transportation Co.*, 129 Ill. 2d 1, 40-41, 541 N.E.2d 643 (1989).

The *Parson* case is similar to the case *sub judice*. Here, the evidence of a lack of prior falls could hardly establish proper maintenance of the taxi tunnel, where there was undisputable evidence that water seeped through the roof and walls, the road surface was made of cobblestones, and stalactites leached from the concrete and dripped onto the ground, and taxicabs deposited oil on the road surface. Amtrak's Bitting himself acknowledged the possibility that someone could step on the accumulation of drops on the ground from the stalactites.

Although the circuit court would have been within its discretion to allow evidence of no prior accidents, it cannot be said that the court abused its discretion in barring this evidence. There was no error.

IV

Defendants argue that they should have been permitted to introduce evidence of taxes to be withheld from plaintiff's future earnings.

Prior to closing argument, defendants moved *in limine* that damages for lost wages be limited to plaintiff's net wages, not her gross wages. The circuit court ruled that the evidence concerning wage loss would be gross earnings. Plaintiff's final salary at Amtrak was $50,800, with an additional annual fringe benefits of $6,858. During closing argument, plaintiff told the jury to multiply the sum of these amounts by the expected remainder of her working life, 22 years, which equals $1,268,476. The jury awarded her $1,246,000 for future lost earnings.

The circuit court's ruling deprived defendants of a fair trial on the damages issues. The measure of damages in FELA cases are federal in character, even where, as in the present case, plaintiff joins her federal and common law action in one lawsuit. "The supremacy clause of the United States Constitution requires preemption of State laws or common-law standards which conflict with Federal statutes and the execution of their full objectives." *Argueta v. Baltimore and Ohio Chicago Terminal R.R. Co.*, 224 Ill. App. 3d 11, 19, 586 N.E.2d 386 (1991). In *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 62 L. Ed. 2d 689, 100 S. Ct. 755 (1980), the United States Supreme Court held that it was error to exclude evidence offered to show the effect of income taxes on plaintiff's estimated future earnings in an FELA case. The Court stated: "It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows inexorably that the wage earner's income tax is a relevant

factor in calculating the monetary loss ***." *Liepelt*, 444 U.S. at 493-94, 62 L. Ed. 2d at 693-94, 100 S. Ct. at 757. See also *Oltersdorf v. Chesapeake & Ohio R.R. Co.*, 83 Ill. App. 3d 457, 464, 404 N.E.2d 320 (1980).

In this case, defendants should have been allowed to show the effect of income taxes on plaintiff's estimated future earnings. Plaintiffs' argument that taxes withheld do not always approximate actual taxes paid does not persuade. In *Liepelt*, the Court explained that uncertainty in estimating future income-tax liabilities is not a sufficient reason to reject the introduction of such evidence. 444 U.S. at 494, 62 L. Ed. 2d at 694, 100 S. Ct. at 758.

The circuit court erred in barring this evidence, and defendants are entitled to a new trial on the issue of damages.

V

Defendants next contend that the circuit court erred in instructing the jury that they could award plaintiff damages for "loss of enjoyment of life" and "pain and suffering."

During the jury instruction conference, plaintiffs tendered Illinois Pattern Jury Instructions, Civil, Nos. 30.01, 30.04, 30.05, 30.06, 30.07 (3d ed. 1994) (hereinafter IPI Civil 3d), which stated:

> "If you decide for the plaintiff *** on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate her for any of the following elements of damage ***:
>
> The reasonable expense of necessary medical care, treatment, and services received.

Future lost earnings.

Loss of a normal life.

Pain and suffering.

Whether any of these elements of damages has been proved by the evidence is for you to determine."

The jury awarded plaintiff, in part, $875,000 each for loss of a normal life and pain and suffering.

In the interpretation of a federal statute, the decisions of the federal courts are controlling on Illinois courts. *Golden Bear Family Restaurants, Inc. v. Murray*, 144 Ill. App. 3d 616, 619-20, 494 N.E.2d 581 (1986); *Arnold v. Babcock & Wilcox Co.*, 154 Ill. App. 3d 863, 870, 507 N.E.2d 218 (1987), *aff'd*, 123 Ill. 2d 67, 525 N.E.2d 59 (1988). In *Dugas v. Kansas City Southern Ry. Lines*, 473 F.2d 821, 827 (5th Cir. 1973), the court held that under the FELA, damages for loss of a normal life "are to be included as a part of pain, suffering, and inconvenience. It is not a factor to be separately measured as an independent ground for damages." In *Earl v. Bouchard Transportation Co., Inc.*, 917 F.2d 1320, 1326 (2d Cir. 1990), a case brought under the Jones Act (46 U.S.C. §688), the court cited *Dugas* and explained that "no matter how [this] issue is decided, *** the result should have no effect on awards by a properly instructed jury." The court reasoned that damages for loss of a normal life are a compensable item to be included somewhere in the total damage award. Therefore, whether damages for loss of life are included in the damages calculated for pain and suffering, or are calculated separately, the total damages awarded by the jury should be the same. *Earl*, 917 F.2d at 1326-27.

In the case *sub judice*, the circuit court relied on *Smith v. City of Evanston*, 260 Ill. App. 3d 925, 936-38, 631

N.E.2d 1269 (1994), a case brought under state law, where this court held that the jury should be instructed to award damages for "loss of a normal life," as a separate element because it is less likely to be misunderstood than if it were included in the blanket category of "disability."

Although the damage award of $875,000 for loss of a normal life may not have been duplicative, upon retrial deference should be given to the federal character of this FELA claim and damages considered according to principles governing such actions. Accordingly, "loss of a normal life" should not be considered separately as an independent ground for damages.

VI

Defendants identify error in the circuit court ruling that they could not present evidence of plaintiff's failure to mitigate damages by not losing weight and refusal to submit this issue to the jury, especially where plaintiffs opened the door to this issue.

Video evidence deposition testimony of Dr. James Ahstrom was introduced at trial. The transcript of the evidence deposition was attached to defendants' post-trial motion. In that deposition transcript, Dr. Ahstrom, an orthopedic surgeon, testified that he treated plaintiff, beginning in April 1987. He estimated that in June 1987, plaintiff weighed over 300 pounds. He performed a diskectomy and an inner body fusion on plaintiff in November 1987 to relieve pressure the disc was causing on the nerve. Following surgery, plaintiff "had a fair amount of discomfort" and continued to experience pain. Following an office visit about a month after surgery, Dr.

Ahstrom described plaintiff as "doing pretty well" and all-in-all, "doing beautifully."

By February 1988, plaintiff had returned to work full time and had lost 85 pounds. In April 1989, additional surgery was performed on plaintiff to relieve pressure on the nerve. Following that surgery, she experienced better feeling in the left lower extremity, but she still needed medication for her pain. Dr. Ahstrom did not believe that her condition would improve or that anything could be done to improve it. At some indeterminate time in the future, plaintiff's weight increased about 125 pounds. With regard to plaintiff's obesity, Dr. Ahstrom testified that when plaintiff was first hospitalized the hospital nutritionist gave her a weight reduction diet. Dr. Ahstrom also recommended that she lose weight. He believed that her weight problem made it difficult for her to get well and contributed to the unsuccessful results of her surgeries.

Prior to trial, the circuit court ruled that evidence of plaintiff's weight would not be allowed to establish liability in the case or to show that the operations were more difficult, but reserved ruling on whether it would be allowed to show a failure to mitigate. The court and the parties subsequently edited the deposition of Dr. Ahstrom for the purpose of determining which portions would be presented to the jury. The court ruled that evidence relating to plaintiff's weight would not be allowed to show her failure to mitigate because it was speculative. The court noted that it was unclear from Dr. Ahstrom's deposition whether the nutritionist was assigned to plaintiff because of her obesity or if it was common hospital practice to do so; whether she was prescribed a particular weight loss program, and if so,

whether she followed it; and to what extent her weight limited her ability to recover from her injuries.

At trial, plaintiffs introduced the video evidence deposition testimony of Carol Gordon, which the parties previously edited by agreement. At the conclusion of that showing, defendants moved to reopen the deposition of Dr. Ahstrom because Gordon was permitted to testify via video deposition that losing weight would not have improved plaintiff's condition. The circuit court denied defendants' request, stating that it had not even read the deposition before it was played to the jury and defendants themselves agreed to the substance of the deposition presented to the jury. The court said that it would not change the posture of the case because defendants should have objected before the tape was played to the jury.

A party who procures, invites, or acquiesces in the admission of improper evidence cannot complain with respect to the admission of said evidence. *Hamrock v. Henry*, 222 Ill. App. 3d 487, 495, 584 N.E.2d 204 (1991). Here, defendants cannot complain of the evidence allowed in Gordon's deposition testimony where they acquiesced in its admission.

Under the FELA, a party has a duty to mitigate damages, and defendant is entitled to an instruction if there is record evidence to support it. *Brown v. Chicago & North Western Transportation Co.*, 162 Ill. App. 3d 926, 932, 516 N.E.2d 320 (1987). See also *Khatib v. McDonald*, 87 Ill. App. 3d 1087, 1095, 410 N.E.2d 266 (1980) (Illinois law). In *Muller v. Lykes Brothers Steamship Co., Inc.*, 337 F. Supp. 700, 706 (E.D. La.), *aff'd*, 468 F.2d 951 (5th Cir. 1972), the court held that plaintiff, who weighed over 300 pounds, failed to minimize damages

when he discontinued treatment in a weight reduction program that was prescribed by his doctor for the express purpose of relieving stress on his injured knee. But, in *Kratzer v. Capital Marine Supply, Inc.*, 645 F.2d 477, 483 (5th Cir. 1981), the court rejected the argument that plaintiff, who was overweight, failed to mitigate his damages because he did not attempt to lose weight at his doctors' suggestion. The court distinguished *Muller* because Kratzer was not placed on a doctor-administered weight reduction program and was "glibly" told by his doctors to lose weight, although the benefits were uncertain. *Kratzer*, 645 F.2d at 483-84.

The present case is more analogous to *Kratzer*. It was unclear from Dr. Ahstrom's deposition whether the nutritionist was assigned to plaintiff because of her obesity or if it was common hospital practice to do so. Further, his testimony is unclear as to the benefits of any weight reduction. Finally, the testimony is obscure as to when plaintiff put on the additional weight, why her weight increased, and if she ever attended a weight reduction program.

The circuit court did not err in denying admission of this evidence and refusing to give the instruction.

VII

Defendants' final argument is that plaintiff's right to receive long-term disability benefits should have been permitted in evidence. Alternatively, a set-off should have been ordered to reflect the value of the future benefits plaintiff would receive.

At the conclusion of plaintiffs' case-in-chief, defense counsel informed the circuit court that plaintiff had been

approved for long-term disability benefits under an insurance policy covering Amtrak and CUS employees that would pay her 60% of her salary annually until she reached 66 years of age. The court ruled that the evidence would be excluded.

Defendants objected to this ruling in their post-trial motion, which attached the policy in question and an affidavit of Amtrak's Director of Compensation and Benefits, who averred that plaintiff received $4,587.50 in benefits through June 1994 and would receive $1,825 per month "for as long as she remains disabled under contract provisions to [the] end of her 65th birthday."

Under the collateral source rule, a plaintiff may recover the full measure of damages, without set-off or credit, although she is also compensated from an independent source such as insurance. *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 449 (8th Cir. 1984) (*Clark*). In contrast, section 55 of the FELA provides that "in any action brought against any [ ] common carrier ***, such common carrier may set off therein any sum it has contributed or paid to any insurance *** that may have been paid to the injured employee *** on account of the injury or death for which said action was brought." 45 U.S.C. §55 (1988).

Although the language of section 55 appears broad enough to swallow the collateral source rule, courts have limited its scope by focusing on the provision that the covered payments be made "on account of the injury." *Clark*, 726 F.2d at 450. A distinction is drawn between those situations where payments emanate from a fringe benefit, such as a retirement fund or a general hospital and medical insurance plan, and payments where the employer has undertaken voluntarily to indemnify itself

against possible liabilities under the FELA. See *Clark*, 726 F.2d at 450 and cases cited therein. The rationale underlying this approach is that an employer who voluntarily undertakes to indemnify itself against liability by payment into a fund for that purpose should not be penalized by permitting plaintiff a double recovery, whereas an employer who makes payments into a fund established for an independent reason, such as to provide the employee a fringe benefit, should not be entitled to benefit by setting off such amounts against his liability to the employee. *Clark*, 726 F.2d at 450.

In determining whether an amount is a fringe benefit, the important consideration is the character of the benefit received, rather than whether the employer is actually the source of the fund. *Clark*, 726 F.2d at 450. Guidance in making this determination may be found in the specific provisions of the benefits plan in issue. *Burlington Northern R.R. Co. v. Strong*, 907 F.2d 707, 713 (7th Cir. 1990).

In the instant case, it should be noted initially that defendants did not make a proper offer of proof at trial thereby enabling the circuit court to reach a correct decision. All supporting affidavits as well as the insurance policy were presented in their post-trial motion. Because the court was not adequately informed as to the substance of the proffered evidence at trial, the issue was not properly preserved. See *State Farm Fire & Casualty Co. v. M. Walter Roofing Co.*, 271 Ill. App. 3d 42, 45-46, 648 N.E.2d 254 (1995). Nevertheless, since the damages issues must be retried, the disability compensation question will be considered here.

Defendants' disability insurance policy stated, in pertinent part, that one of its purposes was,

> "for the Employer to use its benefits (which are not a collateral source because they are provided as an employment benefit at no cost to the employee) *to satisfy any liability for lost wages under F.E.L.A.* to a disabled or injured employee covered by this contract and for the Employer to avoid duplicate liability under both this contract and F.E.L.A." (Emphasis added.)

This policy language clearly demonstrates that defendants undertook to indemnify themselves against possible liabilities under the FELA. It does not appear that the fund was established for any independent reason.

Plaintiff maintains that defendants are entitled to set off only the premiums paid and not the benefits received. Section 55 allows a set-off for amounts "contributed or paid to any insurance." 45 U.S.C. §55 (1988). Judge Friendly's oft-cited concurrence in *Blake v. Delaware & Hudson Ry. Co.*, 484 F.2d 204, 207 (2d Cir. 1973), explained that railroads are entitled to set-off only the premiums, not what the premiums bought, except as allowed by "specific provision in the collective bargaining agreement." Here, there was no such agreement. Accordingly, on retrial Amtrack, the sole defendant in the FELA claim, is entitled to a set-off for premiums paid under this long-term disability policy.

For the aforestated reasons, that part of the judgment assessing liability against defendants and in plaintiffs' favor is affirmed; that part of the judgment assessing damages is reversed and remanded for a new trial in accordance with the views expressed in this opinion.

Affirmed in part, reversed and remanded, in part, for a new trial on damages only.

DiVITO and BURKE, JJ., concur.

No. 81778

In the Supreme Court of Illinois

NANCY E. VAN HOLT and LOUIS VAN HOLT,

Plaintiffs-Respondents,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION, a foreign corporation, and CHICAGO UNION STATION COMPANY, a domestic corporation,

Defendants-Petitioners.

Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 95-1265. There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division, No. 89 L 04861. The Honorable **Allen A. Freeman**, Judge Presiding.

PETITION FOR LEAVE TO APPEAL OR FOR SUPERVISORY ORDER

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PETITION FOR LEAVE TO APPEAL OR FOR SUPERVISORY ORDER

To The Honorable Justices of the Illinois Supreme Court:

Your petitioners, National Railroad Passenger Corporation ("Amtrak") and Chicago Union Station Company ("CUS"), hereby petition for leave to appeal from the decision of the Illinois Appellate Court, First District, rendered herein on July 30, 1996, as modified on denial of rehearing September 3, 1996 *nunc pro tunc* July 30, 1996 (leave to file rehearing petition and motion for certificate of importance denied September 25, 1996). The Appellate Court affirmed in part and reversed in part a judgment on a jury verdict against defendants in the Circuit Court of Cook County. An Affidavit of Intent to File a Petition for Leave to Appeal was filed on September 26, 1996, one day after the Appellate Court denied defendants' motion for leave to file a petition for rehearing of the Appellate Court's modified opinion. This Petition for Leave to Appeal was timely filed per this Court's order extending the time to file same to and including October 8, 1996.

REASONS FOR GRANTING LEAVE TO APPEAL

The Appellate Court's initial and modified opinions demonstrate the manifest need for this Court's pronouncement on the extent to which federal damages law must apply when a plaintiff chooses to join an FELA claim with a state common law claim, and then seeks and obtains a joint and several damages judgment against both defendants. In particular:

1. The Appellate Court's decisions show the need for this Court's resolution of the constitutional issue presented when a plaintiff seeks to impose a single measure of damages jointly and severally against two defendants—one under the FELA and one under the common law. In this case, plaintiff sought and obtained a joint and several $2,745,000 judgment against Amtrak (under the FELA) and CUS (under the common law). At trial, plaintiff successfully sought jury instructions which would impose *the same measure of damages on both defendants*. The verdict form plaintiff submitted likewise required the jury to return *the same amount of damages as to both defendants*. Nevertheless, in its second, "modified," opinion, the Appellate Court affirmed the damages judgment against CUS, and ordered a new damages trial as to Amtrak only. Such a result raises a fundamental issue under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, which can only be resolved by this Court. It also conflicts with the reasoning of another First District appellate court decision, *Argueta v. Baltimore & Ohio Chi. Term. R.R. Co.*, 224 Ill.App.3d 11, 586 N.E.2d 386 (1st Dist. 1991), *app. den.*, 144 Ill.2d 631, 591 N.E.2d 20 (1992), expressly stating that the Supremacy Clause requires the application of federal damages law "where a plaintiff chooses to join federal and common law actions in one lawsuit." Only this Court can resolve this constitutional and decisional conflict.

2. The Appellate Court's decision also conflicts with an established line of federal cases involving the non-applicability of the collateral source rule to long term disability insurance benefits payable to railroad employees under policies purchased by their employers. The

Appellate Court recognized that the collateral source rule does not apply, but then limited the railroad's set-off to the premiums paid for the disability insurance. This is contrary to an established line of federal cases holding that set-off should be in the full amount of the disability benefits the employee received. This recurring issue likewise deserves this Court's review in order to guide the trial courts throughout the state; otherwise these courts will be faced with conflicting decisions as to how disability insurance benefits must be set off in FELA cases.

3. Alternatively, this Court should at the very least issue a supervisory order under Supreme Court Rule 383, directing the Appellate Court to permit defendants to respond to plaintiff's argument—made for the first time in her rehearing petition—that FELA damages law did not apply to her case against CUS. By accepting plaintiff's rehearing argument and reinstating the full damages judgment against CUS in its "modified" opinion on "denial of rehearing," the Appellate Court in essence granted plaintiff's rehearing petition against CUS without ever permitting defendants to answer plaintiff's petition. Such a procedure is contrary to the spirit if not the intent of Illinois Supreme Court Rule 367, which governs petitions for rehearing.

STATEMENT OF FACTS

The detailed facts appear in the Appellate Court's opinion. For purposes of this petition, the relevant facts may be summarily stated as follows:

Plaintiff Seeks And Obtains A Joint And Several Judgment Against CUS And Amtrak

Plaintiff Nancy Van Holt filed a complaint in the Circuit Court of Cook County against Amtrak under the FELA and against CUS under the common law, seeking to recover for injuries sustained when she slipped and fell in a taxi tunnel at Chicago Union Station on April 14, 1987. (R. V1, C2.) A jury returned a verdict in favor of plaintiff and against Amtrak and CUS in the amount of $3,050,000, as follows:

Reasonable expense of necessary medical care, treatment, and services received	$ 54,000
Future lost earnings	1,246,000
Loss of a normal life	875,000
Pain and suffering	875,000

(R. V5, C1196.) The jury further found that plaintiff was negligent and 10% at fault for the accident. Accordingly, the court entered a joint and several judgment against both defendants in the amount of $2,745,000.[1] (R. V5, C1201.)

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[1] Plaintiff's husband received a $90,000 judgment against CUS on a common law loss-of-consortium claim, not relevant here.

Defendants Appeal; Appellate Court Orders New Trial On Damages For Both Defendants

On July 30, 1996, the Appellate Court issued an opinion (Appx. A) in which it held that the circuit court's refusal to permit the defendants to show plaintiff's net earnings "deprived *defendants* of a fair trial on the damages issues." (Orig. Op. at 11-12 (emphasis added).) The Appellate Court thus awarded Amtrak and CUS a new trial on the issue of damages, holding that:

- The trial court committed reversible error in failing to follow the United States Supreme Court's holding in *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755 (1980). *Liepelt* held that it is error to exclude evidence offered to show the effect of income taxes on a plaintiff's estimated future earnings in an FELA case because "after-tax income, rather than . . . gross income" is the measure of damages for future lost wages under the FELA. (Orig. Op. at 12.)
- The trial court also erred in instructing the jury that it could award plaintiff damages for "loss of enjoyment of life" and "pain and suffering," because under the controlling federal law of damages, "loss of a normal life" should not be considered separately as an independent ground for damages. (Orig. Op. at 13-14.)

The Appellate Court further held that the trial court erred in refusing to allow Amtrak a set-off attributable to a long term disability insurance policy it purchased for plaintiff. (Orig. Op. at 17-19.) The Appellate Court held that because Amtrak's intent in purchasing the policy was "to satisfy any liability for lost wages under the F.E.L.A.," it was entitled to a set-off. However, the Court then held, contrary to a line of federal decisions,

that Amtrak's set-off would be limited to "only the premiums, not what the premiums bought." (Orig. Op. at 19.)

Appellate Court Denies Rehearing In A Modified Opinion Which Grants Plaintiff The Relief Prayed For In Her Rehearing Petition Against CUS; Defendants Have No Opportunity To Rebut Plaintiff's Rehearing Arguments

The parties filed timely rehearing petitions. Defendants' petition was limited to a request that the Appellate Court reconsider and hold that Amtrak's set-off on retrial would be for the amount of the long term disability benefits Mrs. Van Holt will receive under the long-term disability plan, not just the amount of premiums Amtrak paid. Plaintiff's petition urged, for the first time, that the judgment against CUS be affirmed in its entirety, because the FELA evidentiary and instructional errors pertained only to Amtrak, the FELA defendant, and not to CUS, the common law defendant.

The Appellate Court at no time requested or otherwise allowed defendants to file an answer to plaintiff's rehearing petition. *See* Illinois Supreme Court Rule 367(d) (no answer to rehearing petition permitted unless requested by court or petition granted).

On September 3, 1996, the Appellate Court issued a "modified opinion . . . upon denial of rehearing" (Appx. B) in which it granted the precise relief against CUS that plaintiff requested in her rehearing petition: the judgment against CUS was now affirmed in its entirety, and the new trial was now to be solely "against Amtrak on FELA damages only." (Mod. Op. at 19.) The modified

opinion was dated "September 3, 1996 *nunc pro tunc* July 30, 1996" and bore the following indicia:

> NOTICE
>
> The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

Because the new opinion was backdated "*nunc pro tunc* July 30, 1996," defendants, in an abundance of caution, immediately moved this Court for an extension of time in which to file this petition. This Court granted the motion for extension of time to October 8, 1996.

Appellate Court Denies Defendants' Motion For Leave To File A Petition For Rehearing Of The September 3, 1996 Modified Opinion

Relying on the above "NOTICE" in the modified opinion, defendants prepared a petition for rehearing of the modified September 3, 1996 opinion, raising the Supremacy Clause and waiver arguments they would have raised had the Appellate Court given them an opportunity to answer plaintiff's rehearing petition in the first instance. (Appx. C.) On September 13, 1996, defendants moved for leave to file this rehearing petition. The Appellate Court denied leave on September 25, 1996. (Appx. D.)

ARGUMENT

I. THIS COURT SHOULD DECIDE AN UNSETTLED ISSUE OF CONSTITUTIONAL SIGNIFICANCE: MUST FEDERAL DAMAGES LAW APPLY TO BOTH DEFENDANTS WHEN A PLAINTIFF PURSUES JOINT AND SEVERAL JUDGMENTS AGAINST ONE DEFENDANT UNDER THE FELA AND ONE UNDER THE COMMON LAW?

The unsettled issue raised by this case has far-reaching significance on the conduct of FELA trials in Illinois: when a plaintiff pursues joint and several judgments against one defendant under the common law and another defendant under the FELA, does the Supremacy Clause mandate that federal law controls the measure and amount of damages as to both defendants?

Only one appellate court in Illinois has contemplated this issue, and answered "yes." In *Argueta v. Baltimore & Ohio Chi. Term. R.R. Co.*, 224 Ill.App.3d 11, 586 N.E.2d 386 (1st Dist. 1991), *app. den.*, 144 Ill.2d 631, 591 N.E.2d 20 (1992), the railroad appealed an adverse judgment, contending that because the plaintiffs' action was brought under the FELA, the trial court's failure to instruct the jury that a damage award would not be subject to income tax constituted reversible error. *See Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 493-94, 100 S. Ct. 755, 757 (1980) (holding same). The plaintiffs argued that under the common law of Illinois, it is error to give the instruction *Liepelt* requires, *i.e.*, that a compensatory damage award is nontaxable (*see Klawonn v. Mitchell*, 105 Ill.2d 450, 475 N.E.2d 857 (1985)), and that the presence of a common-law defendant in the lawsuit precluded the railroad from its entitlement to the FELA-*Liepelt* instruction.

The *Argueta* court agreed with the defendant and held that under the Supremacy Clause of the United States Constitution, FELA damages law controlled:

> [W]here a plaintiff chooses to join Federal and common-law actions in one lawsuit, Federal law and its construction by the United States Supreme Court cannot be ignored. The supremacy clause of the United States Constitution requires preemption of State laws or common-law standards which conflict with Federal statutes and the execution of their full objectives. U.S. Const. art. VI, cl. 2. * * *
>
> [T]he plaintiffs cannot reap the benefits derived from pursuing one defendant under a Federal statute, and then selectively eliminate unfavorable portions of the statute by relying on the presence of another defendant whom the plaintiff has sued under State law.

Argueta, 224 Ill.App.3d at 19, 586 N.E.2d at 391.

While the issue was not squarely presented as to the common law defendant in *Argueta*,[2] the same rationale should apply, particularly where, as here, plaintiff seeks to impose the same measure and amount of damages jointly and severally against both the FELA and the common law defendants. It has long been settled that questions concerning the measure of damages in FELA actions are federal in character and, even in a case brought in state court, must be settled according to general principles of federal law as administered in federal courts. *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 334, 108 S. Ct. 1837, 1842 (1988). The Supremacy Clause of the United States Constitution provides:

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[2] The common law defendant settled after verdict.

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Illinois common law doctrine of joint and several liability "holds joint tortfeasors responsible for all of the plaintiff's entire injury, allowing plaintiff to pursue all, some or one of the tortfeasors responsible for his injury for the full amount of the damages." *Coney v. J.L.G. Industries, Inc.*, 97 Ill.2d 104, 119-20, 454 N.E.2d 197, 204 (1983); *accord Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill.2d 429, 452, 593 N.E.2d 522, 532 (1992) ("When defendants are found to be jointly and severally responsible for an injury, the plaintiff may elect to satisfy his entire judgment against any one of the defendants."). Accordingly, when, as here, a plaintiff sues one defendant under the FELA, and pursues a joint and several judgment against a common law defendant as well, the Supremacy Clause necessarily requires that FELA damages law must control the measure and amount of damages as to both defendants.

The Supremacy Clause issue is squarely presented here and ripe for decision. Only this Court can and should be the final arbiter of such a fundamental Constitutional question that will affect the conduct of future FELA cases throughout the state of Illinois.

II. THE APPELLATE COURT'S RESOLUTION OF THE COLLATERAL SOURCE ISSUE INVOLVING PLAINTIFF'S LONG-TERM DISABILITY INSURANCE BENEFITS CONFLICTS WITH AN ESTABLISHED LINE OF FEDERAL CASE LAW.

This case also manifests the need for this Court to provide guidance to the entire Illinois bench and bar on a recurring collateral source rule problem which arises under the FELA. It was undisputed in this case that plaintiff's employer purchased a long-term disability insurance policy from the CIGNA Insurance Companies that will pay plaintiff $1,825.00 per month for as long as she remains disabled until age 65. (R. V7, C1517-18.) The disability policy itself manifested the parties' intent that the benefits payable thereunder were to be used to "satisfy any liability for lost wages under F.E.L.A. to a disabled or injured employee covered by this contract and for the Employer to avoid duplicate liability under both this contract and F.E.L.A." (R. V7, C1526.)

The Appellate Court properly held that such a statement of intent rendered the collateral source rule inapplicable, but then held that the amount of the set-off was limited to the amount of the premium paid for the policy, on the grounds that there was no collective bargaining agreement providing for a full-benefits set-off. This holding is contrary to an established line of federal decisions holding that where a collective bargaining agreement or *the insurance policy language itself* demonstrates the employer's intent to use the disability benefits to indemnify itself against potential FELA liability, it is proper to allow a set-off of those same benefits.

For example, in *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 451 (8th Cir. 1984), cited by the Appellate

Court with approval (Mod. Op. at 17-18), there was no collective bargaining agreement, but the court held that the intent of the parties could be determined from the language of the disability policy, which stated that the amount of benefits "shall be reduced by any amount paid . . . to the employee under any Workmen's Compensation or similar law (including, but not limited to, loss of income payments under the Federal Employer's Liability Act)." *Id.* at 451 n.3. Accordingly, the court allowed the employer to set off the full amount of the disability benefits paid to plaintiff.

Fogg v. National R.R. Passenger Corp, 585 A.2d 786, 794 (D.C. 1991), presented a situation virtually identical to the one *sub judice*. The plaintiff there was an Amtrak management employee, so there was no collective bargaining agreement. As here, there was a CIGNA long-term disability policy under which the plaintiff was receiving 60% of her salary as benefits. The court looked for guidance to "the text of the insurance or disability plan itself"and held that "the trial judge did not err in concluding that Amtrak intended the long-term disability insurance to supplement FELA payments . . . [and thus] properly excluded evidence of the loss of income for which plaintiff was still being compensated." *Id.* at 794.

In *Allen v. Exxon Shipping Co.*, 639 F. Supp. 1545, 1549 (D. Me. 1986), the collective bargaining agreement was silent as to disability insurance, but the court also looked to the language of the policy itself, which "clearly evidence[d] an intent by the employer 'to make a voluntary disability plan supplemental to sums recovered under the FELA[.]'" *Allen*, 639 F. Supp. at 1549. A full benefits set-off was thus required.

Instead of following these recent decisions, the Appellate Court cited a concurring opinion by Judge Friendly in *Blake v. Delaware & Hudson Ry.*, 484 F.2d 204, 207 (2d Cir. 1971), indicating his view that a full benefits set-off would be allowed only where there was "a specific provision in a collective bargaining agreement." (Mod. Op. at 19.) However, as set forth above, the more recent cases have held that in the case of a non-union employee the same evidence and intent can be found, as in this case, in the disability insurance policy itself. In short, there is no logical or legal basis to have the amount of the railroad's set-off for disability insurance turn on the happenstance circumstance of whether the injured employee is a management or union employee.

The Appellate Court's Holding Would Actually Discourage The Purchase of Disability Insurance

Not only does the Appellate Court's holding conflict with recent federal case law and frustrate the parties' intent to use disability insurance to "satisfy any liability for lost wages under FELA," but it also would serve as a disincentive for railroad employers to purchase long-term disability insurance for their non-union employees. If all an employer could ever expect to receive in a non-union case would be a refund of the premiums it paid for the plaintiff's disability policy, then it would be in the same position it would have been in had it not bothered to pay the premium to buy the disability policy in the first instance.

For this reason alone, this Court should review this case.

III. ALTERNATIVELY, THIS COURT SHOULD ISSUE A SUPERVISORY ORDER THAT WILL AT LEAST GIVE DEFENDANTS AN OPPORTUNITY TO ANSWER PLAINTIFF'S ARGUMENTS—MADE FOR THE FIRST TIME ON REHEARING—THAT FELA DAMAGES LAW DID NOT APPLY TO HER CASE AGAINST CUS.

As set forth above, the initial Appellate Court opinion granted both Amtrak and CUS a new trial on the issue of damages, expressly holding that the trial court's erroneous evidentiary and instruction rulings under FELA damages law "deprived defendants of a fair trial" on the damages issues. (Orig. Op. at 11-12.) Thereafter plaintiff filed a rehearing petition urging for the first time that the federal law of damages did not control or apply to her joint and several judgment against CUS. The Appellate Court requested no answer to the plaintiff's petition for rehearing. Then on September 3, 1996, it issued its second opinion "modified . . . on denial of rehearing" which granted plaintiff the precise relief that she requested in her rehearing petition—reinstatement of the full $2,745,000 judgment as to CUS—even though the modified opinion still provides that "*defendants*" were deprived of a fair damages trial! (Mod. Op. at 11 (emphasis added).)

Defendants respectfully submit that this course of proceedings violated the spirit if not the letter of Rule 367(d), which provides:

> **Rule 367. Rehearing in Reviewing Court** * * *
>
> **(d) Answer; Reply; Oral Argument.** No answer to a petition for rehearing will be received unless requested by the court or unless the petition is granted. If the petition is granted or if an answer is

> requested, the opposing party shall have 21 days from the request or the granting of the rehearing to answer the petition, and petitioner shall have 14 days after the due date of the answer within which to file a reply. [Further provisions on copies, briefs, and oral argument.]

Had defendants been allowed to submit an answer to plaintiff's rehearing petition, they would have raised not only the Supremacy Clause argument discussed in Point I, *supra*, but a compelling waiver argument as well. For it was plaintiff who, from day one, crafted this as a joint-and-several liability case against Amtrak and CUS, never once contending (until her rehearing petition) that the same measure and amount of damages did not apply equally to both defendants. At trial and in her appellate brief, plaintiff's only quarrel with the *Liepelt* net wages formulation was with defendants' evidence. (R. V13, 18-23, 43-47; Pl. Br. at 30-31.) She never argued that whatever *Liepelt* requires did not apply equally to both defendants. Indeed, she expressly conceded otherwise in her appellate brief:

> [D]efendants apparently were attempting to show by payroll reports (which did not appear until the post-trial motion) what plaintiff's taxes would have been for the rest of her work life and, in any event, *the proper instruction mandated by* Liepelt *was given to apply to both a common law case and the FELA case.*

(Pl. Br. at 33 (emphasis added).) So, too, plaintiff submitted, and the trial court gave, an instruction setting forth *the same elements and measure of damages for both defendants*. (R. V5, C1164.) Likewise, she submitted, and the trial court used, a verdict form obliging the jury to return *the same damages verdict against both defen-*

dants. (R. V5, C1196-98.) Plaintiff even argued to the jury that the two defendants were essentially one entity and that CUS was just a "shell" of Amtrak. (R. V13, 139.) There is ample authority that under these circumstances, plaintiff waived or was estopped from raising this argument for the first time on rehearing. *See, e.g.*, S. Ct. R. 341(e)(7) (point cannot be raised for the first time on rehearing); *Hamann v. Lawrence*, 354 Ill. 197, 207, 188 N.E. 333, 336 (1933) (as modified on denial of rehearing).

The Appellate Court, however, rendered its decision without even hearing, let alone considering, this waiver argument or the aforementioned Supremacy Clause argument.

The modified opinion was dated "September 3, 1996 *nunc pro tunc* July 30, 1996," creating uncertainty about the proper schedule for seeking further relief. The modified opinion also contained the "NOTICE" language which indicated that rehearing was still available. Defendants accordingly undertook to prepare a rehearing petition, but when they submitted it to the appellate court, the court denied leave to file it.

At minimum, a $2,745,000 judgment should not be reinstated against a party without at least granting that party one opportunity to rebut the arguments on which the reinstatement is based. Accordingly, as alternative relief, these defendants respectfully request that this Court issue a supervisory order directing the Appellate Court either to:

(a) vacate the September 3, 1996 modified opinion, grant plaintiff's petition for rehearing, and thereafter

receive an answer and reply as set forth in Rule 367; or alternatively to

(b) vacate the September 25, 1996 order denying defendants' motion for leave to file a petition for rehearing of the modified opinion, grant defendants' motion for leave to file said rehearing petition, and rule on said petition.

CONCLUSION

To resolve important and unsettled questions of FELA law and procedure that will affect the future trials of FELA cases throughout the state of Illinois, petitioners respectfully request that their petition for leave to appeal be allowed.

In the alternative, petitioners respectfully request that this Court issue a supervisory order pursuant to Supreme Court Rule 383, directing the Appellate Court to permit them to respond to plaintiff's rehearing arguments, before granting plaintiff any relief on rehearing.

Respectfully submitted,

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Dated: October 8, 1996

(2)

Supreme Court, U.S.
FILED
APR 2 1997
CLERK

No. 96-1403

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL RAILROAD PASSENGER CORPORATION, a foreign corporation, and CHICAGO UNION STATION COMPANY, a domestic corporation,

Petitioners,

vs.

NANCY E. VAN HOLT and LOUIS VAN HOLT,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case went to verdict on plaintiffs' complaint premised on the FELA against Amtrak and common law premises liability against Chicago Union Station Company (CUS). The jury was instructed as to the elements of each separate cause of action. The same attorney represented both defendants. A joint and several judgment was entered against each defendant. The Appellate Court of Illinois granted Amtrak a new trial on damages only based on Federal evidentiary principles unique to FELA cases and affirmed the judgment against CUS, the State law defendant, there being no error as to it under Illinois law. Against this background, the questions presented are:

I. Whether jurisdiction of this Court is lacking because there is no final judgment as to Amtrak and CUS failed to raise the preemption issue below.

II. Does Section 5 of the FELA require gross benefits paid, rather than premiums, to be set off against the employee's recovery where Amtrak's sole outlay therefor was to pay a premium and no agreement exists between Amtrak and its employee to render Section 5 inapplicable?

III. Can CUS employ the Supremacy Clause to shrink its Illinois common law liabilities by claiming the FELA encompasses it too?

LIST OF PARTIES

Chicago Union Station Company is an Illinois corporation registered under the laws of that State. Throughout its petition, petitioners omit the designation "Company." Petitioners' statement that National Railroad Passenger Corporation is the parent company of Chicago Union Station Company misleads as the two are separate and distinct entities.

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OPINION BELOW

Petitioners' reference to "an earlier opinion" is misleading. The "earlier opinion" was not "modified." Rather, it became a nullity when withdrawn by the Appellate Court of Illinois and replaced by the official reported opinion. (Pet. App. 28) The "earlier opinion" contained glaring factual inaccuracies as to the alignment of the parties to the causes of action which, when recognized by the Appellate Court, resulted in issuance of the reported opinion necessitating clarification of the Court's holding. The Illinois Supreme Court denied leave to appeal and also petitioners' second attempt at review in the form of a Motion for Supervisory Order. (Resp. App. 1)

JURISDICTION

Respondents question this Court's jurisdiction to review the judgments below.

Amtrak has been fully accorded all its Federal rights which have yet to be finally determined in a possible retrial against Amtrak on damages only. A retrial may not be necessary because respondents will obtain satisfaction of the judgment against CUS from it or its appeal bond surety. Accordingly, a "final judgment" against Amtrak has not yet occurred and the issue it raises will become moot.

CUS's sole basis for review by this Court is that the Supremacy Clause of the United States Constitution grants it the right to be the recipient of Federal rights Congress gave only to railroad employers under the FELA. Chicago Union Station Company is purely a com-

mon law defendant for which no preemption is provided by the FELA. CUS did not raise the issue in the trial court.

STATEMENT OF THE CASE

To put matters in focus, certain cogent observations must be made:

1. No complaint was made in the courts below that the damages awarded to respondents were excessive.
2. Petitioners have never contested the fact that at the time of the occurrence, plaintiff Nancy Van Holt was engaged in the course of her employment and was on the private property of the common law defendant Chicago Union Station Company.[1] Thus, she was a business invitee as to CUS and an employee as to Amtrak.
3. The judgment against CUS is based on the failure of CUS to exercise its common law duty of ordinary care for plaintiff's safety and that against Amtrak on its FELA duty to provide her with a safe place to work. Pursuant to jury instructions delineating between the two separate causes of action, a joint and several judgment was entered; plaintiffs may satisfy their entire judgments against either defendant. In this case, it will be exercised against CUS and operate as a set off against the amount obtained against Amtrak on retrial, if any.

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[1] Petitioners' insistence on omitting the word "Company" throughout its petition is indicative of its attempt to relegate this Illinois corporation to less than a viable entity.

4. Both Amtrak and CUS permitted themselves to be represented from the inception of this case by the same attorney. That attorney acceded to all jury instructions and verdict forms. He neither tendered nor requested the trial court to treat the causes of action separately for damage purposes nor did he submit any instructions or verdict forms to the contrary. He did, however, tender to the trial court the instruction concerning taxes mandated for FELA cases by *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980).
5. There is no place in this record showing respondents agreed that CUS would be entitled to FELA measure of damages.

Petitioners' statement of the holding granting Amtrak a set off of premiums paid for long-term disability insurance conveniently omits the fact that the Appellate Court held Amtrak failed to properly preserve this point for review. (App. 23) Amtrak's quest for a set off was for the gross amount paid and to be paid to plaintiff until she reaches her sixty-fifth birthday. However, there is no evidence in this record that Amtrak is providing the benefits from its own funds. Rather, the record reflects only that Amtrak paid a premium to an insurance company for the benefits. Moreover, on retrial it may appear that plaintiff had deductions taken for this insurance and thus paid for it herself.

Finally, in an effort to raise the Supremacy Clause as a basis for seeking review on behalf of CUS, petitioners go *dehors* the record and state, without citation to the record, that "plaintiff had previously acceded to imposition of the FELA measure of damages to both defendants." (Pet. p. 8) Rather, the record reflects that the jury was carefully instructed as to the law applicable to

each of the two causes of action against each defendant and no agreement allowing the FELA to preempt plaintiffs' State law cause of action can be cited to this Court. (Given and refused instructions, R. V5, C1130 *et seq.*)

Moreover, as demonstrated by the Appellate Court's opinion, while there may have been minor (arguably harmless) error unique to the FELA case, none appeared as to the common law case.[2]

REASONS FOR DENYING THE WRIT

I.

THERE IS NO FINAL ORDER AS TO AMTRAK AND THE QUESTION CUS ARGUES WAS NOT RAISED IN OR DECIDED BY ANY COURT BELOW.

The question Amtrak presents has yet to be finally determined at a retrial. What the final judgment will be depends on the outcome of a complete hearing on the

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[2] Petitioners' irrelevant discussion (Pet. p. 5) of the two FELA errors found by the Appellate Court glosses over the fact that they were errors the trial judge had no opportunity to commit.

First, Amtrak's statement concerning the trial court's refusal to allow evidence of taxes on plaintiff's lost future earnings omits reference to the fact that defense counsel first attempted to inject the question into the trial after plaintiff had been cross-examined as to her earnings without any mention of taxes and rested. Defense counsel then referred to a document apparently showing deductions from plaintiff's wages which was not introduced into evidence and no offer of proof was made. (R.V13, 18-23)

Second, insofar as the instruction substituting "loss of a normal life" for "disability" as an element of damages is concerned, defense counsel specifically stated he had no objection to it. (R.V13, 53-55)

issue. That this is the present status is clear from the holding of the Illinois Appellate Court that Amtrak failed to preserve this issue for review and thus the trial court "was not adequately informed as to the substance of the proffered evidence at trial." *Van Holt v. National R.R. Passenger Corp.*, 669 N.E.2d 1288, 1300 (1996), also App. 23.

Consequently, the finality requirement of 28 U.S.C. § 1257 is absent and review ought to be denied. *O'Dell v. Espinoza*, 456 U.S. 430 (1982), dismissing certiorari for want of jurisdiction where Colorado Supreme Court remanded case for trial. The issue at bar does not fit one of the "very few" exceptions to the rule because determination of the Federal question now will not terminate the necessity for remand. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).[3]

As to the question by CUS arguing the Supremacy Clause, the issue of preemption was not raised by CUS in the trial or appellate courts and thus was not passed on or decided below. This Court has refused to consider claims that were not raised in, addressed to or decided by any court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992); *Beck v. Washington*, 369 U.S. 541, 549-53 (1962). Accordingly, review of the judgment against CUS ought to be denied.

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[3] Additionally, a retrial involving the set off issue may never occur; thus the issue is moot at this point. Plaintiffs may satisfy the full amount of the judgment against CUS or its appeal bond surety. When that occurs the retrial against Amtrak will be moot. Under such circumstances, this Court has declined to consider the question presented. *DeFunis v. Odergaard*, 416 U.S. 312 (1974).

II.

THERE IS NO LACK OF UNIFORMITY IN COURTS' INTERPRETATIONS OF SECTION 5 OF THE FELA.

The Illinois Appellate Court fully followed established law concerning set offs of disability benefits in FELA cases. The significant point that Amtrak consistently and conveniently ignores is that all Amtrak had contributed toward the benefits that plaintiff received is the payment of that portion of a premium relating to the insurance therefor and there is no agreement between Amtrak and plaintiff to render Section 5 inapplicable.

Section 5 of the FELA specifically provides that a railroad employer may set off "any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee***." Courts have consistently found that when it is applicable, Section 5 plainly does not provide for set off of "benefits received," but rather for a set-off of "any sum***contributed."

Accordingly, while the Appellate Court may or may not have correctly held that benefits plaintiff receives from disability insurance are not a collateral source and are therefore entitled to set off, it correctly concluded, in accord with uniform law and the plain language of §5, that under the record in this case Amtrak would be entitled to set off the premium paid for plaintiff's disability insurance and not for the gross amount of "benefits received."[4]

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[4] Because of Amtrak's failure to make a proper offer of proof and the unorthodox manner in which Amtrak belatedly injected this issue at trial, the entire subject was never fully

(continued...)

Folkestad v. Burlington Northern, Inc., 813 F.2d 1377 (9th Cir. 1987), is a definitive decision from the Ninth Circuit on this issue. It enumerated certain precepts pertaining to Section 5 gleaned from case law and concluded that set off of gross amounts paid was proper where a collective bargaining agreement contained a specific provision that entire benefits, rather than premiums, could be set-off against the employee's FELA recovery. As the foundation for its holding the court used Judge Friendly's oft cited statement in *Blake v. Delaware and Hudson Railway Co.*, 484 F.2d 204 (2d Cir. 1973), that:

> Under 45 U.S.C. §55 [Section 5 of the FELA], the railroad is entitled to set off the premiums, not what the premiums bought. This was recognized as long ago as *Bangor & Aroostook R. Co. v. Jones*, 36 F.2d 886 (1 Cir. 1919). If the railroads wish to avoid the harsh result reached by the district court, they can accomplish this by specific provision in the collective bargaining agreement. [813 F.2d at 1382].

The *Folkestad* court noted that "Judge Friendly in *Blake* was not suggesting that the amount of insurance benefits received can never be off set. His point was that if the employers wish the insurance to fulfil their liabilities under FELA, they should endeavor to negotiate a provision to that effect in the collective bargaining agreement." 813 F.2d at 1382-3. Accordingly, *Folkestad* held that set off would be allowed in that case as there was a collective bargaining agreement agreeing that it be done.

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[4] (...continued)
aired. It may well be that plaintiff paid for this insurance through payroll deductions. Accordingly, as stated earlier, it is submitted that the lack of finality dictates there should be no review of this issue at this time.

Significantly, after its exhaustive analysis, the *Folkestad* court concluded:

> "Given the facts of this case, the result we reach does not conflict with any of the holdings of the Supreme Court, or any Federal Court of Appeals decisions. No such cases have denied set-offs in the face of a collective bargaining agreement provision stipulating the purpose of the benefits in FELA cases." [813 F.2d at 1383]

The court had no problem in blending its decision with that of the Eighth Circuit in *Clark v. Burlington Northern, Inc.*, 726 F.2d 448 (8th Cir. 1984), on which Amtrak in the case at bar places principal reliance and where there was no collective bargaining agreement. This was because in *Clark*, the railroad was paying the entire disability benefit *out of its own funds*. This affirmatively appears from the court's statement that:

> Although an insurance company administered the plans, Burlington wholly funded them and they were not a part of any collective bargaining agreement. [726 F.2d at 451]

The Seventh Circuit reached the same result as *Folkestad* in *Burlington Northern, Inc. v. Strong* (1990), 907 F.2d 707, noting the existence of a comprehensive collective bargaining agreement which governed the employee's relationship with the employer. The court determined the entire amount of benefits may be set off "because of the terms of the agreement" and thus FELA §5 was "inapplicable." Further, as in *Folkestad* and in contradistinction to the case at bar, "Burlington paid the entire amount necessary to fund the SSB program." 907 F.2d at 714.

So too, in petitioner's case of *Allen v. Exxon Shipping Co.*, 609 F.Supp. 1545 (D. Me. 1986), the court took special note that "the Exxon disability plan is self-funded by the employer, and that payments made by [Exxon] into the plan 'are based upon the amount paid out to the disabled employees of Exxon.'" 639 F.Supp. at 1548.

Obviously, in sharp contrast to the case at bar, the covered employers in *Clark*, *Folkestad* and *Allen* were entitled to set off the benefits received by the employees because, in accord with the strict and plain terms of Section 5, each had "contributed or paid" the entire benefit to the employee, as opposed to only a premium.

In sum, in the case at bar, the only matter appearing of record is that Amtrak may have paid a premium toward the insurance which is paying benefits to plaintiff. In addition, on remand to the trial court, it may well appear that plaintiff had deductions taken from her paycheck for this insurance in which event Amtrak would be entitled to no set-off whatsoever. *Folkestad*, 813 F.2d at 1380, and cases cited therein.

It should also be noted that in addition to the lower court's finding that Amtrak failed to preserve this point for review, the insurance contract itself is laden with contingencies which will cause cessation of payments or a reduction thereof. For example, it provides that "payment of future benefits will depend on certification of your continuing disability, and on other, applicable contract provisions." It further provides that long-term disability benefits are reduced by any other benefits received, such as social security paid because of dependents and employer pensions, including the railroad retirement payments. It noted continuing updates on the

payee's physical condition were requested through examinations by the insurance company physician and will only continue "while under the care of a licensed physician." (R.V7 C1544-C1545) [5]

It is submitted that contrary to Amtrak's claim of the need for this court to establish a "uniform rule," a uniform rule already exists. This is a case where there is no collective bargaining agreement to render FELA §5 "inapplicable" nor is there any self-funding by Amtrak so as to entitle it to set off gross payments. As such, the plain and unambiguous terms of Section 5 apply and based on the present state of the record on this issue the Appellate Court was correct in holding that Amtrak was entitled to set off premiums only.

III.

THE FELA DOES NOT PREEMPT PLAINTIFFS' ACTIONS AGAINST A PROPERTY OWNER SUED PURSUANT TO STATE COMMON LAW.

In this case a joint and several judgment has been entered against two separate defendants. One is Amtrak charged in count I of plaintiff's third amended complaint under the FELA and the other is CUS charged in count II with failing to use ordinary care in the maintenance of its property. Count III was for Mr. Van Holt's loss of consortium which was brought only against the property

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[5] Indeed, as to future benefits, the trial court inquired whether defense counsel would be willing to stipulate that plaintiff would receive these benefits to age 65 and counsel's vague and equivocal response was, "There is no guarantee that anybody is going to be guaranteed wages or fringes for the rest of their life under any circumstances." (R.V11, 209-210)

owner, CUS. (R. V5, C1124)[6] The jury was carefully instructed as to the separate causes of action; defendants neither requested nor tendered any instructions separating damage elements as to each cause of action. See given and refused instructions at R. V5, C1130 *et seq.*

Both defendants were represented by the same attorney who made no attempt to distinguish the rights of his respective clients, such as by the filing of a counter-claim for contribution or an affirmative defense of preemption in the cause of action against CUS. In Illinois, preemption is an affirmative defense which must be plead. *Haudrich v. Howmedica, Inc.* (1996), 169 Ill.2d 525, 662 N.E.2d 1248, 1254. In addition, as stated, the preemption issue was not raised by CUS in the courts below; it ought not to be allowed to be raised to this Court. Thus, petitioners' "surprise" at this issue allegedly appearing for the first time at the Appellate Court's issuance of its official opinion is, at most, a feigned contention.[7]

While the foregoing is sufficient to dispose of this point, it is nonetheless clear that the FELA only preempts application of State law against Amtrak. Here, the proclaimed errors unique to the FELA case are conceded not to be errors as to the common law case against CUS.

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[6] The FELA does not permit actions for loss of consortium against railroads. *Jess v. Great Northern R. Co.*, 401 F.2d 535 (9th Cir. 1968).

[7] Petitioners ignore that the withdrawn opinion of the Appellate Court commenced with the erroneous statement that in addition to the FELA, "Amtrack" [sic] was sued under the common law and that Mr. Van Holt sued Amtrak for loss of consortium. (App. 31) When the court issued its official opinion, these errors were corrected. Thus, it was the correction of the erroneous statement of the Appellate Court which led it to conform the result.

See *Klawonn v. Mitchell* (1985), 105 Ill.2d 450, 475 N.E. 2d 857, (*Liepelt* not to be followed in a non-FELA case) and *Smith v. City of Evanston* (1994), 260 Ill.App.3d 925, 631 N.E.2d 1269 ("loss of a normal life" to be given in lieu of "disability" in State common law cases.)

Further, it is clear that nothing stated by Congress in the FELA, 45 U.S.C. §51 *et seq.*, dictates that an FELA action either expressly or impliedly preempts plaintiff's rights against a common law non-FELA defendant separately joined in the same case on a State law theory.

It is axiomatic that the scope of the FELA is "to cover the subject of liability of railroad companies to their employe[e]s injured while engaged in interstate commerce." *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59, 66 (1913); *New York Central & Hudson River R.R. Co. v. Tonsellito*, 244 U.S. 360 (1917). When, for example, a third party action for contribution arising out of the FELA is involved, State law will govern as it is an action between the railroad and a third party, not an employee. *Shields v. Consolidated R. Corp.*, 810 F.2d 397 (3rd Cir. 1987). At bar, respondents' causes of action against CUS clearly do not arise under the FELA as CUS is not a railroad employer and respondents are not employees of CUS, but merely business invitees governed by Illinois premises liability law.

Additionally, plaintiff Nancy Van Holt had a right to join a tort-feasor who was liable to her only at common law with a defendant who was liable to her only under the FELA. 45 U.S.C. §56 grants concurrent jurisdiction over FELA actions to State courts without any restrictions. And, Illinois practice clearly permits such joinder. See 735 ILCS 5/2-405 permitting joinder of defendants jointly or severally, 735 ILCS 5/2-613, permitting plead-

ing separate causes of action in separate counts, and 735 ILCS 5/2-614 permitting the joinder of causes of action against separate defendants.

Clearly, the two causes of action proceeded through the trial court on separate tracks and it was up to two-hatted counsel defending petitioners to preserve whatever distinctions he thought necessary for the proper representation of those parties.

CUS's scant review of the law on this issue is misleading. While it cites generic case law to the effect that a railroad's rights under the FELA cannot be infringed upon by State law, no citation appears to support its novel contention that the Supremacy Clause requires a court to place a common law non-FELA defendant within the ambit of the FELA. If it were as CUS claims, business invitees who are injured at Union Station could file suit against it under the FELA. It is submitted that this Court's expected reaction to such a proposition demonstrates the folly of CUS's argument.

Petitioners quote a passage from the opinion below which cites *Argueta v. Baltimore & Ohio Chicago Terminal R. Co.* (1991), 224 Ill.App.3d 11, 586 N.E.2d 386, asserting that it supports their position. (Pet. pp. 17-18) However, *Argueta* held only that a railroad was entitled to a new trial on the issue of damages due to failure of the trial court to apply FELA evidentiary principles at the trial against the railroad. In *Argueta*, there was a common law defendant at trial which had settled out.

Accordingly, the Illinois court in *Argueta* did not decide the FELA preempted the common law action so as to cloak the common law defendant with FELA protection. Consistent therewith, at bar, the court below pointedly held that "federal evidentiary principles must be applied

in the FELA claim" and noting that Amtrak was "the sole defendant in the FELA claim" granted a new trial to Amtrak only "with respect to the FELA claim." (App. 15)

In sum, only Amtrak was covered by the direct pre-emptive effect of the FELA. Congress had no intent of preempting the law applicable to a non-FELA defendant proceeded against in State court pursuant to State premises liability principles; Amtrak has been accorded the full purposes and objectives of the Congressional act. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982).

CUS simply cannot get into the Act.

CONCLUSION

Plaintiff-respondent Nancy Van Holt was injured ten years ago. She is entitled to closure. The letter of the FELA has been applied to Amtrak and further delay ought not to occur based on CUS's claim of an imaginary agreement that does not appear of record.

The petition for writ of certiorari ought to be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

(Letterhead Of)

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

January 22, 1997

Mr. Hugh C. Griffin
Lord, Bissell & Brook
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THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 81778—Nancy E. Van Holt et al., respondents, v. National Railroad Passenger Corporation, etc., et al., petitioners.

Motion by movants for a supervisory order. Motion *denied.*

JH:lgr
cc: Mr. Robert H. Joyce
Mr. Donald J. Nolan

(3)

APR 16 1997

OFFICE OF THE CLERK

No. 96-1403

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL RAILROAD PASSENGER CORPORATION, a foreign corporation, and CHICAGO UNION STATION COMPANY, a domestic corporation,

Petitioners,

vs.

NANCY E. VAN HOLT and LOUIS VAN HOLT,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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6 pp

PETITIONERS' REPLY

I. THIS COURT HAS JURISDICTION BECAUSE NOTHING ON RETRIAL WILL AFFECT THE APPELLATE COURT'S LEGAL RULING ON THE MEASURE OF SET-OFF.

Despite plaintiffs' assertions to the contrary (Resp. Br. at 4-5), the finality requirement of 28 U.S.C. § 1257 is satisfied in this case. The Illinois Appellate Court ordered a new trial against Amtrak limited to the issue of damages only. (Petition (Pet.) at App. 24.) The appellate court held that on retrial, Amtrak is entitled to a set-off on account of the long term disability insurance it bought for Mrs. Van Holt because Amtrak paid for the insurance, the insurance is not a fringe benefit, and Amtrak bought the insurance intending to use the benefits to offset potential FELA liability. (Pet. at App. 23.) The appellate court further held that Amtrak's set-off on retrial will be limited to premiums paid. (Pet. at App. 24.) These are legal rulings and nothing that happens on retrial will change or otherwise affect them.

As a result, this case is one of the "recurringly encountered situations" in which the Court takes jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). To use the language of the Court in *Cox*, "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings" because "[n]othing that could happen" in the damages trial "would foreclose or make unnecessary decision on the federal question." *Id.* at 480.

The question put to the Illinois Appellate Court was simple and straightforward—is set-off for disability insurance in an FELA action measured by the amount of benefits the employee received and will receive in the future or is it limited to the premiums the employer paid? The appellate court answered "premiums only" (Pet. at App. 24) and nothing on retrial will change that.

Plaintiffs disingenuously suggest that "it may well appear" that plaintiff paid for the disability insurance herself through payroll deductions and that this would somehow change the import of the appellate court's legal ruling. (Resp. Br. at 9.) There is absolutely no record support for this musing. No such contention was ever made below, either during the extensive post-trial proceedings in the trial court or during the years the case was before the Illinois courts of review. The appellate court held that *Amtrak* procured the disability insurance "voluntarily to indemnify itself against possible liabilities under the FELA" and not "for any independent reason" as a "fringe benefit." (Pet. at App. 23.)

Plaintiffs observe that in some of the cases where full-benefits set-offs have been allowed, the plan was "funded" by the plaintiff's railroad employer. (Resp. Br. at 8.) This is meaningless. Case after case holds that in determining set-off, the "purpose and nature of the fund and of the payments" controls, "and not merely . . . their source." *Burlington Northern R.R. v. Strong*, 907 F.2d 707, 713 (7th Cir. 1990) (quoting *Folkestad v. Burlington Northern, Inc.*, 813 F.2d 1377, 1381 (9th Cir. 1987)). The Illinois Appellate Court held that Amtrak's purpose in obtaining disability coverage for its employees was to

"use [the] *benefits* . . . to satisfy any liability for lost wages under F.E.L.A." (Pet. at App. 23.)

In any event, the instant record is clear that Amtrak through its premium payments also provides the "funding" for the Connecticut General disability plan. Amtrak pays a monthly premium for every non-union employee, not just for those who are disabled. (R. V7, C1533.) The insurance contract provides that the premiums are adjustable and can go up or down "from time to time" on 31 days written notice, "based upon experience." (R. V7, C1535.) Plaintiffs would have the amount of Amtrak's set-off turn on who writes the disability check. There is no support in law or logic for such a contention.

II. AMTRAK NEVER RAISED "PREEMPTION" IN THE TRIAL COURT BECAUSE IT NEVER HAD TO—PLAINTIFFS SOUGHT (AND OBTAINED) A JOINT AND SEVERAL JUDGMENT WITH THE SAME MEASURE AND AMOUNT OF DAMAGES AGAINST BOTH DEFENDANTS.

Plaintiffs complain that Amtrak never raised a "preemption" argument in the trial court, overlooking that they themselves rendered this defense unnecessary by framing their case as one of joint and several liability (Resp. Br. at 2, 10, 12) and seeking (and obtaining) the same measure and amount of damages against both the FELA and the common law defendant.

Plaintiffs also claim that they never "acceded" to imposition of the FELA measure of damages to both defendants. (Resp. Br. at 3.) But of course they did—by seeking a joint and several judgment and the same measure of damages against both defendants in the first

place. Plaintiffs even conceded in their appellate brief that the FELA damage instructions from *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980), applied to both the common law and FELA defendants:

> [T]he proper instruction mandated by *Liepelt* was given to apply to *both the common law case and the FELA case.*

(Pl. Appellate Br. at 33 (emphasis added).)

In sum, plaintiffs' present claim that their "cases" against Amtrak and CUS proceeded on "separate tracks" (Resp. Br. at 13) is an after-the-fact mischaracterization of the way they framed this action from day one. Indeed, by seeking one joint and several judgment in the same amount against both Amtrak and CUS, plaintiffs not only agreed to have the FELA measure of damages apply to both defendants—they mandated this result!

Plaintiffs' argument that acceptance of Amtrak's position will lead to business invitees suing railroad stations under the FELA (Resp. Br. at 13) is preposterous. Business invitees do not have an FELA action against anyone. Plaintiff did have an FELA action against her employer Amtrak. When she elected to join that FELA action with a common law action against CUS *and to seek one joint and several judgment against both*, the Supremacy Clause required that the FELA measure of damages apply to *both*.

Respectfully submitted,

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